83-332

No. ..-....
IN THE

Supreme Court of the United States

October Term, 1983

COUNTY OF LOS ANGELES,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Can, and did, Congress intend to apply the ADEA differently to similar federal, state and local law enforcement occupations or to exempt only federal law enforcement personnel from ADEA coverage? If so, does it constitute an unconstitutional application of the Act to the states?

2. Was the Petitioner's entry age limit of 35 for law enforcement/firefighting personnel a bona fide occupational qualification, or an exception to the Age Discrimination in Employment Act considering Congressional authorization of age limitations for the same federal occupations?

3. Did the Circuit Court adopt an unreasonable and impermissibly strict BFOQ standard for law enforcement agencies contrary to the intent of Congress by, *inter alia*, precluding consideration of (a) economic or career longevity factors unique to those agencies, and (b) comparable federal age limitations?

4. Was the trial court's application of the medical findings clearly erroneous?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 26, 1983.

Opinion and Judgment Below.

The opinion of the Ninth Circuit Court of Appeals is printed as Appendix A and is reported as *Equal Opportunity Commission v. County of Los Angeles*, ___ F.2d ___ (9th Cir. 1983), 31 F.E.P. cases 1474. The district court's Memorandum Opinion and Judgment are printed as Appendices B and C, respectively.

Jurisdiction.

The opinion of the Ninth Circuit Court of Appeals was entered on May 26, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1) and Rule 17(1)(a), (c).

Statutes Involved.

29 U.S.C. § 631 *et seq.*, Age Discrimination in Employment Act (ADEA).

United States Code, Title 5, Sec. 3307(d).

United States Constitution, Article I, section 8, clause 3 (Commerce Clause).

United States Constitution, the Tenth Amendment thereof.

Statement of the Case.

The County of Los Angeles, similar to the majority of federal and state law enforcement and firefighting agencies, imposed maximum hiring and retirement age limitations for its deputy sheriffs and fire department helicopter pilots. This case concerned only the entrance age limitation of 35 years.

The District Court, ruling that the ADEA could constitutionally be applied to state and local governments, held that the defendant's maximum age limitations of 35 for deputy sheriff and helicopter pilots was not a BFOQ, and hence violated the act. The trial court rejected the defendant's contention that federal hiring age limits for similar law enforcement and firefighting occupations indicated a congressional intent that law enforcement agencies were exempt or that age for those occupations was to be considered a BFOQ. Although recognizing that the jobs in question were physically arduous which, as a general matter younger persons were more physically able to handle, the defendant's BFOQ contentions had to be rejected because, *inter alia*, there were some persons over age 40 who could physically out-perform younger persons, and that current medical tests could accurately diagnose the present physical condition of an applicant. (Appendix B, p. 18).

Applying the two-pronged BFOQ standard of *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976),[1] the Court found that the first prong had been satisfied because the functions of a police officer and helicopter pilot in the firefighting service[2] of the defendant County of Los Angeles involved very physically demanding and arduous tasks which required a high degree of physical fitness and stamina. The physical fitness requirement was therefore reasonably necessary to the essence of the defendant's business of providing protective services to the public. (Appendix B, p. 14).

The Court, however, went on to reject defendant's BFOQ claim, because it found that despite the only 52% effectiveness of laboratory cardiovascular tests (stress EKG/CKG) in detecting asymptomatic disease, other simple and reliable tests existed which were 99% accurate as a "short-term" predictor of the likelihood of cardiac difficulty. (Appendix B, p. 17). The Court held that long-term physical, economic, personnel, or career longevity consequences to the public employer could not be considered as a factor in the BFOQ determination (Appendix B, pp. 19, 20) and that no special or more relaxed standard applied to safety occupations.

It was acknowledged that Congress had authorized the establishment of maximum age limits for entry into federal

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[1]The second prong of the *Tamiami* standard provides that the defendant employer has the burden of showing that age was a BFOQ either by

1) showing that all or substantially all persons above the age limit are unable to meet the defendant's health and physical performance standards, or

2) that there was no practical way to differentiate qualified from unqualified applicants other than by reference to age. *Usery v. Tamiami, supra* at 227.

[2]The evidence showed that helicopter pilots' jobs were even more arduous than that of a deputy sheriff, periodically requiring in Southern California 8-10 hours of non-stop solo flying under extremely hazardous conditions. (RT 151-160).

law enforcement, firefighting and other occupations and such age limits were being enforced. The EEOC did not contend that the County's law enforcement and firefighting duties are less arduous than their federal counterparts. The EEOC further acknowledged that the ADLA and its BFOQ standards applied equally to federal, state, and local governments. (EEOC Post-Trial Brief, p. 14). Agreeing that career longevity as affected by the aging process was relevant as a management consideration, the EEOC asserted that for BFOQ purposes only the present or short-term physical condition of applicants was a relevant hiring criteria for public safety employees.

The main factual dispute concerned the effectiveness of feasible available testing in identifying individuals with asymptomatic cardiovascular disease or other age related disabilities. Dr. Swan, an eminent cardiologist and Director of Cardiology at Cedars-Sinai Hospital in Los Angeles, the the only cardiologist witness, testified that the incidence of heart disease has a "direct and very important correlation with age." (RT 277). While the incidence of the disease is greater in increasing age groups, the point where the most dramatic increase occurs is at 40. Between ages 30 to 50 the incidence of heart disease increases by a factor of 20. (RT 450).[3]

In Dr. Swan's medical opinion, the County's age 35 entry limit for deputy sheriffs and helicopter pilots was medically justified and reasonable and that its elimination would adversely affect the Sheriff and Fire Departments. (RT 328). Dr. Swan testified, that if one contrasted the incidence of cardiovascular disease between a group hired at age 40 and a group hired at age 25 (the average hiring age of deputy

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[3]The incidence rises from one-tenth of one percent at age 25 to 15 percent at age 60. (RT 284).

sheriffs (RT 328)), at the end of 20 years of service, 144 per one thousand individuals from the former group would be lost from service but only 17 would be lost from the group commencing at age 25. The death rate for the first five years of service for the cohort entering at age 40 was thirty times that of the group commencing their careers at age 25.

Dr. Swan testified that the most practical and effective noninvasive cardiovascular test available to employers was a combination of a stress EKG/CKG, and it was accepted by both the trial and the appellate courts that such tests correctly identified only 52 percent of asymptomatic individuals actually having coronary heart disease. The lack of long-term effectiveness of current feasible tests was never in dispute. The EEOC's position was that only the present or short-term physical condition of the applicant constituted a valid hiring criteria and this could be ascertained by current tests.

Accepting the 52 percent accuracy of the stress EKG/CKG, the EEOC countered with evidence that, by the consideration of certain risk factors such as individual smoking habits, family history, weight, and exercise activities, one could predict with greater than 99% probability whether an individual will have a heart attack within the next 12 months. (Appendix A, p. 9).

On appeal, the Circuit Court found that:

1. The Supreme Court's decision in *EEOC v. Wyoming* had decided the constitutional question against the County.
2. *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982) did not decide the question presented by the County, to wit, whether Congress intended the ADEA to be applied differently to similar state, federal and local occupations. (Appendix A, p. 4).

In reliance on this court's decision in *EEOC v. Wyoming*, the Circuit Court ruled that the ADEA *can* apply to similar state and federal law enforcement occupations differently.

3. That economic and career longevity considerations impacting on law enforcement agencies could not be considered.
4. That the *Usery v. Tamiami*[4] BFOQ standard was applicable without modification to state and local law enforcement agency age limitations and that it had not been met in this case.

Finally, the Court rejected the defendant's contentions regarding the District Court's misunderstanding of the evidence concerning the effectiveness of current cardiovascular tests.

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[4]Ironically, the *Tamiami* decision upheld the age limit of 35 for bus drivers on the ground that medical tests were inadequate to detect age related disabilities.

REASONS FOR GRANTING THE WRIT.

1. There is presented an important federal question of broad public significance which has not been, but should be, settled by the Court. The Court should harmonize the standards governing age as a BFOQ for state and federal law enforcement occupations to avoid inconsistent and unjustified treatment of the same public safety occupations.

The significant questions that should be decided are (a) whether the ADEA, and in particular its BFOQ exemption, can apply differently to similar federal, state and local safety occupations, (b) what constitutes a reasonable BFOQ standard for law enforcement and other safety occupations in harmony with Congressional intent, and (c) whether the ADEA was constitutionally applied in this case.

2. The decision of the Ninth Circuit is in conflict with the decisions of other circuits on the same matters raised herein.

I.

CONGRESS INTENDED CONSISTENT TREATMENT OF AGE LIMITS FOR SIMILAR FEDERAL, STATE AND LOCAL SAFETY OCCUPATIONS AND THAT SUCH AGE LIMITS WERE A BFOQ.

A. The Supreme Court Should Establish a Reasonable BFOQ Standard to Avoid Inconsistent Treatment of Similar Safety Occupations and to Harmonize Federal and State Hiring Practices.

Although the Supreme Court on a number of occasions has upheld mandatory hiring and retirement limits under the Equal Protection Clause,[3] and recently in *EEOC v. Wyoming, supra,* ruled that the extension of the ADEA coverage

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[3] *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562 (1976); *Vance v. Bradley,* 403 U.S. 93, 99 S.Ct. 939 (1979).

to the states was constitutional, it has yet to address the appropriate standards for age as a BFOQ for law enforcement personnel.

This case presents substantially different issues and a more limited Constitutional question than in the recently decided case of *EEOC v. Wyoming*. The case at bar raises a number of significant legal questions relating to what constitutes appropriate and reasonable BFOQ standards applicable to age limits for law enforcement, firefighting and other public protective service occupations.

The law enforcement and firefighting duties performed in metropolitan areas are essentially the same. They are physically very demanding and extremely arduous, although it has been generally recognized that state and local law enforcement and firefighter functions are more arduous and intensive than their federal counterparts.[6] Considering the physical demands of these jobs regardless of the jurisdiction, it should be expected that age limits, both for hiring and retirement, would be consistently applied, with divergence justified only because of factual differences in duties and functions rather than the governmental jurisdiction involved.

This, however, has not been the case. Federal age limits, far broader than those generally applicable to state and local occupations, have been upheld. *Thomas v. U.S. Postal Service*, 647 F.2d 1035 (1981) (Age 34 limit for appointment of postal inspectors); *Bowman v. U.S. Department of Jus-*

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[6]The Congressional Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service of the 95th Congress, in its October 5, 1978 report entitled "*Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Fire Fighters and Air Traffic Controllers*" noted that federal law enforcement and firefighting agencies had less arduous and risky duties than those of state and local agencies. "Specifically, DOD revealed that the state and local fire fighters faced 13 times more risks than their [DOD] fire fighters do." (*Ibid.* p. 13).

tice, 510 F.Supp. 1183 (1981) (Mandatory retirement of employees in Bureau of Prisons); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982) (Hiring age limit of 34 for employees of federal correctional facilities). State and local age limits have been the object of inconsistent and contrary treatment. Some entrance and retirement age limitations have been upheld[7] while others involving the same occupations have been struck down. Age limitations have been upheld for bus drivers, airline pilots, state highway patrolmen, and firefighters.[8]

While the determination of whether age is a BFOQ has been generally described as a question of fact, age limits for similarly situated occupations whether in the federal or state sector should be treated in like manner. The current problem facing state and local governments stems from lower courts' misunderstanding of the intent of Congress with regard to law enforcement activities and the imposition of inflexible and unreasonable BFOQ standards as demonstrated by this case. Some courts have considered economic and career longevity factors as being relevant to BFOQ

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[7]*Poteet v. City of Palestine*, 620 S.W.2d 181 (1981) (Maximum hiring age of 35 for police officers); *Beck v. Borough of Manheim*, 505 F.Supp. 923 (1981) (Mandatory retirement age of 60 for police officers upheld); *EEOC v. Missouri Highway Patrol*, 554 F.Supp. 667 (1982) (Age 32 hiring limit for highway patrol officers).

[8]Bus driver age limits upheld: *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 244 (1976) (Age limit of 40 for bus drivers); *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974) (Age limit of 35 for bus drivers); *Maki v. Commissioner of Education, State of New York*, ___ F.Supp. ___, 32 FEP Cases 630 (June 30, 1983) (Mandatory retirement age of 65).

Airline pilot age limits upheld: *Murnane v. American Airlines*, 667 F.2d 98 (1981) (Maximum hiring age of 35 for airline pilots), cert. denied 102 S.Ct. 1770; *Houghton v. McDonnell Douglas Corporation*, 627 F.2d 858 (8th Cir. 1980) (Retirement age of 55 for airline pilots); *O'Donnel v. Schaefer*, 491 F.2d 59 (D.C. Cir. 1974); *Starr v. FAA*, 589 F.2d 307 (1978).

determination.[9] Others, as the Ninth Circuit did, reject them in the belief that Congress precluded such considerations when it enacted the ADEA. A number of courts have held that it is medically impractical to detect the degenerative effects of age so as to adequately distinguish the qualified from the unqualified applicants except by reference to age.[10] Other courts have held that there is no medical justification for a BFOQ.

The federal government clearly appears to have taken a position that age for law enforcement and other safety occupations is a BFOQ or should be permitted notwithstanding the ADEA.

Contemporaneously with their extension of the ADEA to state and local governments in 1974, Congress approved the establishment of maximum hiring and retirement ages by certain federal agencies, most notably in law enforcement, firefighting, the foreign service, air traffic control, and employees of the Bureau of Prisons. Similarly the Federal Aeronautics Administration has established a maximum retirement age of 60 for commercial pilots. The Department of Labor at the time they had jurisdiction over the enforcement of the ADEA, published a regulation (29 CFR § 860.102(d)) which gave as an example of a BFOQ, federal

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[9]*Murnane v. American Airlines, supra; EEOC v. Missouri Highway Patrol, supra.*

[10]In two of the leading cases upholding age as a BFOQ, *Hodgson v. Greyhound Lines*, 499 F.2d 858 (7th Cir. 1974) and *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 244 (1976), the Circuit Court sustained an age limit of 35 for bus drivers on the grounds that degenerative effects of age could not be practically ascertained by hiring tests other than automatic exclusion on the basis of age. The Court of Appeals of Texas in *Poteet v. City of Palestine*, 620 S.W.2d 181 (1981) in upholding the city's maximum hiring age of 35 for peace officers against the challenge that it violated the ADEA, noted that there was no practical way to detect relevant physiological and psychological changes with sufficient reliability to meet special safety obligations.

statutory and regulatory compulsory age limitations when they were clearly imposed for the safety and convenience of the public.

As noted by this Court in *EEOC v. Wyoming*, the majority of state and local jurisdictions have maximum entrance and retirement age limitations. The contrast between federal and state and local hiring practices, as well as the inconsistent judgments below with regard to similar law enforcement and other protective service activities must be resolved by a determination of the appropriate BFOQ standards for these unique occupations.

There is no difference in duties between federal and state law enforcement agencies (if anything, the federal duties are less arduous) that would justify different treatment for state and local agencies. Even if Congress could constitutionally apply the ADEA differently to the same federal and state law enforcement occupations, a reading of the legislative history indicates that such was not within the contemplation of the national legislature. Congress clearly did not intend that age limits were to be justified for federal safety occupations but not for the state and local counterparts simply because the latter were state employees.

B. Congress Intended the Same Treatment of Similar Federal, State and Local Law Enforcement Occupations.

The ADEA originally enacted in 1967 was amended in 1974 to apply to federal, as well as state and local governments. It was again amended in 1978 to extend coverage to persons through age 69. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (Supp. II 1978).

Congress recognizing that age was an appropriate consideration in certain circumstances, provided for an exemp-

tion when age was a *bona fide* occupational qualification (BFOQ).[11]

The legislative history of the BFOQ exemption demonstrates that it was to be a flexible and reasonable standard, applicable even to jobs where physical performance and fitness were not significant factors.[12] Federal regulations adopted to implement the ADEA indicated that the BFOQ exemptions were to be liberally applied to cases involving public safety. (29 CFR § 860.102(d)).

Contemporaneously with the extension of the Act in 1974 to federal, state and local governments, Congress enacted legislation expressly permitting maximum entrance age limitations for a broad range of federal safety occupations.[13]

As stated by Senator Percy, and so found by the Court of Appeals in *Stewart v. Smith, supra,* the purpose of authorizing age limitations for that group of occupations was for the safety of the public which Congress and the federal executive agencies believed would be enhanced by maintaining a relatively young, vibrant, and effective work force.

Senator Charles H. Percy of Illinois remarked before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 93rd Congress,

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[11]The language of that exemption, which has remained unchanged since 1967, is as follows:

> "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification *reasonably necessary* to the normal operation of the particular business. . . ." 29 U.S.C. § 623(f)(1). (Emphasis added).

[12]Positions designed for advancement to executive, administrative, or professional positions. U.S. Code Cong. and Adm. News 67, page 2217.

[13]5 U.S.C. § 3307(d) provides "The head of any agency may, with the concurrence of such agent as the President may designate, determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer or firefighter, as defined by Section 8331(20) and (21), respectively, of this title."

> "It is the intent of this legislation to help federal law enforcement firefighters agencies maintain a relatively young, vibrant, and effective work force, both for the safety of individual officers, and for the society which they serve." . . . [I]t [the legislation] simply acknowledges that every day physical and psychological stress which they must endure all too often results in fatalities and serious injuries not ordinarily encountered by other dedicated public servants." (U.S. Code Cong. and Adm. News 1974, p. 3699).

The purpose of such mandatory entry and separation ages was further elaborated on in the Congressional Record at page 3699.

> "This intent has been based on the nature of the work involved and the determination that these occupations should be composed insofar as possible of young men and women physically able and meeting the vigorous demands of occupations which are far more taxing physically than most in the federal service. They are occupations calling for the strength and stamina of the young rather than middle aged. Older employees in these occupations should be encouraged to retire."

The United States Civil Service Commission, at the time the ADEA was extended to federal employees, was granted pursuant to 5 U.S.C. § 633(a), the responsibility for enforcing in federal employment the anti-discrimination provisions of the Act. 29 U.S.C. § 633. Subdivision (b) provides that the Civil Service Commission is authorized to enforce the age discrimination provisions and in so doing,

> "[r]easonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age *is a bona fide occupational qualification* necessary to the

performance of the duties of the positions." (Emphasis added).

In 1974, when Congress was considering federal age limits for federal employees, the Civil Service Commission supported such legislation.

The action of the U.S. Civil Service Commission in support of the federal employment age limits is illustrative of Congress and the Commission's view that age limits were permissible under the ADEA for protective service occupations. Moreover, for most of the government departments enumerated in 633(a) such as the military department, the Postal Service and police officers in the District of Columbia, age limitations similar to the petitioner's have been invoked.

Interpretations of a statute by an agency charged with its enforcement are entitled to considerable weight. *Griggs v. Duke Power,* 401 U.S. 424 (1971). This is particularly so when they are contemporaneous with the adoption of the statute and are a product of substantial interface with Congress and the U.S. Attorney General. In this instance the actions of the U.S. Civil Service Commission and the statutory authorization by Congress of age limits for comparable federal law enforcement firefighting occupations lead to the inevitable conclusion that age limits are justified either as a BFOQ or an exception to the ADEA for such occupations regardless of governmental jurisdiction.

The District of Columbia Circuit Court on March 9, 1982 in *Stewart v. Smith, supra,* ruled that 5 U.S.C. § 3307(d), which authorizes United States government agencies to set maximum age requirements for appointment to law enforcement positions, is an exception to the ADEA in view of Congress' clear intent to employ maximum entry age as a means to secure a "young and vigorous" work force of law enforcement officers.

The Circuit Court in sustaining the District Court's Summary Judgment noted the history of the federal age limitations.

> "In 1974 Congress enacted Public Law 93-350, 88 Stat. 355, a major piece of legislation designed to enhance the 'youth and vigor' of federal law enforcement personnel. Together with provisions on mandatory retirement and incentives for early retirement, Public Law 93-350 provided agencies employing law enforcement officers with authority to set maximum ages for appointment to law enforcement positions. See 5 U.S.C. § 3307(d). To set such a maximum age rule, an agency first had to receive the concurrence of the Civil Service Commission ("Commission") in its determination that the relevant employees are law enforcement officers." (footnotes omitted). *Supra* at 487.

Noting that the U.S. Civil Service Commission had been designated by the President to concur in this setting of maximum age limitations for law enforcement officers, the Circuit Court stated that

> "[O]n March 12, 1975, it [Commission] concurred in the department's determination, thereby bringing BOP's employees in correctional facilities within the scope of public law 93-350's retirement provisions as well as its provision for setting maximum age requirements." *Id.* at 377.

Thus the Circuit Court noted the relationship between federal age limits and BFOQ exemption as a consequence of the role of the Civil Service Commission in approving such age limits in furtherance of its BFOQ responsibilities under § 633(d).

The Tenth Circuit in *Thomas v. U.S. Postal Inspection Service*, 647 F.2d 1035 (1981) in upholding the maximum hiring age of 34 for postal inspectors noted that it reflected the intent of Congress in 1974 that the physical demands

of law enforcement activities required, "young, strong and vigorous personnel." *Id.* at 1037.

State and federal courts at trial and appellate levels have approved age as a BFOQ for the physically arduous occupations of law enforcement officer and firefighter.

Recognizing current testing limitations, the Court of Appeals of Texas in *Poteet v. City of Palestine*, 620 S.W.2d 181 (1981) recently upheld against a claimed ADEA violation, the city's maximum hiring age of 35 for police officers. In sustaining the age limit of 35, the Court found that there was no practical way to detect relevant physiological and psychological changes in people with sufficient reliability to meet the special safety obligations cast upon beginning police officers.

The federal district court in *EEOC v. Missouri State Highway Patrol*, 554 F.Supp. 667 (1982) found that the maximum hiring age of 32 for highway patrol troopers was a valid BFOQ because of the arduous nature of the job and career longevity considerations.

The same factual record was made by the defendant in this case as in the other cases in which trial and circuit courts have upheld age as a BFOQ. The Court's rejection of age as a BFOQ was predicated upon a misunderstanding of the nature of the applicable BFOQ standard, an erroneous disregard of Congressional intent as demonstrated by federal age limitations, and its misunderstanding of the effectiveness (even in the short term) of current cardiovascular tests. In fact, the same testimony by the same witness for the EEOC (Dr. Mohler) was rejected by other trial courts that upheld age as a BFOQ (*EEOC v. St. Paul*, 671 F.2d 1162; *Murnane v. American Airlines, supra; EEOC v. Missouri State Highway Patrol, supra*).

There is nothing in legislative history to demonstrate a Congressional belief or intent that age limits for state and

local law enforcement personnel were prohibited *per se* or to be treated any differently than those applicable to federal employment. Nor is there any evidence in the Congressional history indicating that Congress intended to withhold from federal employees the full protection of the ADEA.

C. The Circuit Court Misapprehended the Supreme Court's Decision in *EEOC v. Wyoming*.

The Circuit Court below rejected the petitioner's claim that BFOQ standards be measured by comparable federal age limits on the basis of an assumption that this Court in *EEOC v. Wyoming* had considered and dismissed such contentions. The Circuit Court stated, "Thus it is clear that the County's argument was before the Court in *EEOC v. Wyoming*, that the Court considered and rejected it, and that we must do likewise . . ." (Appendix A, p. 5).

The standards applicable to a BFOQ determination were simply not at issue in *EEOC v. Wyoming*. The district court held that the ADEA *per se* could not be applied constitutionally to the states because the Act interfered with integral operations in an area of traditional state activities.

Upon review the Supreme Court did not address what constituted an appropriate BFOQ standard for law enforcement occupations. The Court's holding was limited to ruling that the extension of the ADEA to state and local governments, on its face and as applied, was a constitutional exercise of the power under the Commerce Clause. The matter is remanded to the state court for a determination whether age was a BFOQ for the subject occupations.[14]

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[14] "Perhaps more important appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate there is a 'bona fide occupational qualification' for the job of game warden." *EEOC v. Wyoming*, *supra* at 1062.

In upholding the constitutionality of the ADEA, the majority reasoned that the states were not unduly constrained because they could measure their age limits against "a reasonable federal standard", referring to the BFOQ exemption. If state or local agencies' hiring practices are to be measured against a reasonable federal standard as the majority observed, then surely that standard should include at least a consideration of federal age limits, their factual basis, a comparison of the duties of the state and federal occupations, and the reasoning relied upon by Congress in approving age limits for their law enforcement and firefighting personnel. In short, the petitioners urge that the Ninth Circuit Decision does not conform to a reasonable federal standard or to one that the Congress intended.

The Ninth Circuit, by reference to remarks made in the dissent, misinterpreted the majority holding in *EEOC v. Wyoming*. The remarks were made in the context of demonstrating apparent inconsistency between the ADEA and Congressional action as they bore on the constitutional question. They are not, of course, part of the holding of the court. The only mention of federal age limitations in the majority opinion was in Footnote 17 which merely reflected that such inconsistencies did not transform the ADEA into unconstitutional legislation.

The petitioners herein are not urging that the ADEA is unconstitutional *per se* as extended to the states, but rather that the disparate treatment can and must be resolved by recognition and articulation of the appropriate BFOQ standard Congress intended when it extended the ADEA to state and federal agencies in 1974. There certainly is no factual distinction between federal and state law enforcement and firefighting activities that justifies divergent treatment.

A more reasonable and harmonious interpretation of the Act's BFOQ provision is that Congress in authorizing max-

imum age limits for selected federal occupations at the same time it extended the Act to the states, intended that similar treatment be afforded state and local law enforcement personnel performing similar arduous tasks. The distinction between federal and state law enforcement positions was to be based on the nature of the duties involved, not on the political jurisdiction.

II.

THE CIRCUIT COURT ADOPTED AN UNREASONABLE BFOQ STANDARD FOR LAW ENFORCEMENT AND PUBLIC SAFETY OCCUPATIONS.

A. The Holding Is Contrary to Congressional Intent and Other Circuit Court Decisions.

The district court and circuit court *per se* rejected as valid BFOQ considerations, career longevity factors and the unique economic impact on law enforcement agencies the elimination of age limits would work. Citing *Smallwood v. United Airlines*, 661 F.2d 303 (4th Cir. 1981), and disregarding *Murnane v. American Airlines*, 667 F.2d 98 (D.C. Cir. 1981) the Ninth Circuit stated "economic considerations, cannot be the basis for a BFOQ — precisely those considerations were among the targets of the act." (Appendix A, p. 6).

The trial court *per se* rejected any different treatment of public safety occupations on the theory that the Congress did not recognize a difference when it extended the ADEA to state and local governments in 1974. (Appendix B, p. 19). Neither court below made any analysis of Congressional intent with regard to BFOQ standards to be applied to law enforcement agencies or the significance of the age limits imposed on similar federal positions.

The court adopted the position of the EEOC that only the present physical condition of an applicant was relevant. In

the court's view, future disabilities, reduced terms of assignment in arduous positions such as patrol, and the increased economic costs to the law enforcement agency as a product of hiring older individuals could not be considered. Both lower courts evaluated the effectiveness of cardiovascular and physical tests only in the context of their short-term effect.

The BFOQ exemption adopted by Congress in 1974 contains no prohibition against consideration of career and economic factors as they bore on the question of the validity of age as a BFOQ. Indeed, the legislative history clearly indicates that Congress intended that the career considerations inherent in the extremely arduous and physically demanding law enforcement and other safety services functions were factors "reasonably necessary" to the normal operation of those public services.

The *Tamiami* standard does not preclude consideration of career factors as they impact on law enforcement. The first half of the *Tamiami* standard recognizes age as a BFOQ if the employer can show that all or substantially all persons above the age limit are unable to meet the defendant's health and physical performance standards. The petitioners believe the lower courts misapplied *Tamiami* in limiting the law enforcement agencies "health and physical performance standards" to only *present* conditions. If a law enforcement agency's health and physical performance standards require the optimum ability to perform physically arduous duties over an extended career, then the County's hiring criteria should not have been limited merely to the applicant's *present* physical ability.

The nature of law enforcement and firefighting and other public safety occupations is so unique that it cannot be said that only the applicant's present physical condition is the relevant hiring criteria. In addition to the special statutes

which pertain to injuries incurred in the course of duty, public safety itself demands the highest level of physical performance attainable over the longest period of time, and at the least expense to the taxpayer.

In upholding the extension of the ADEA to states, this Court noted in *EEOC v. Wyoming*, ___ U.S. ___, 103 S.Ct. 1054 (1983) that the states remained free to demonstrate that age is a bona fide occupational qualification. Their personnel practices are not being overridden entirely but are "merely being tested against a reasonable federal standard". *EEOC v. Wyoming, supra* at 1062. The standard adopted by the trial and appellate courts below was not a reasonable standard, nor one that comports with Congressional intent.

There is little dispute that the elimination of age would have an adverse impact on law enforcement agencies, both economically and from a career standpoint. Indeed, the plaintiffs' expert conceded that these were serious problems and that all things being equal, he preferred the employment of younger over older applicants because of the younger's greater career potential. (RT 568, 649-651). As the evidence demonstrated, elimination of age restrictions on law enforcement agencies has an adverse effect in that it (1) results in a limited career pattern and in particular the length of assignment in the arduous patrol assignments, (2) it places the employer at heightened risk because of the increasing prevalence of cardiovascular and other diseases in the age groups of 40 and older, and (3) it exposes the employer to increased number of premature retirements, industrial injuries, reduced flexibility in assignments, and substantial periodic testing expenses.

Unique to law enforcement and firefighting agencies are statutes in many states which create presumptions with regard to workers' compensation benefits for injuries to law

enforcement/firefighting personnel. California and numerous other states[15] have presumptive or so-called heart and lung legislation which basically provides that if a law enforcement officer or firefighter incurs a cardiovascular or lung disease after being employed a certain period of time (five years in California), it is presumed that the disease was incurred in the course and scope of employment and the employee is entitled to preferential hospitalization and retirement benefits. In California the presumption cannot be rebutted by evidence of any preexisting disease. *Turner v. Workers' Compensation Appeals Board*, 258 Cal.App.2d 442 (1968).

While these career and economic considerations may not be the sole criteria for determining whether age is a BFOQ, they should not be summarily rejected. The court's treatment of these factors is contrary to decisions in other circuits. See *Usery v. Tamiami Trail Tours, supra*, as well as *Hodgson v. Greyhound, supra*.

Recently the District of Columbia Circuit in *Murnane v. American Airlines*, 667 F.2d 98 (1981) upheld the airlines entry age limit of 35 for pilots. The Court found the age limit to constitute a BFOQ because the elimination of the age limit would increase the likelihood of risk of harm to the public, particularly noting the relationship between initial hiring and mandatory retirement age limits. The Circuit Court observed that an individual hired over 40 would not have time to acquire the requisite experience before having to retire at age 60 under the FAA requirement.

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[15]Special compensation and presumption statutes for heart and respiratory diseases incurred by police/firefighters have been enacted by Ala., Cal., Conn., Florida, Maine, Ma., Mich., Minn., Nev., N.Hamp., N.J., N.Dak., Ohio, Oregon, Penn., S.C., Ver., Virginia, Wisc. — Larson's Workmen's Compensation Law, § 41.72, Volume 1B (1982).

B. The Lower Courts' Application of Medical Findings to the BFOQ Standard Was Clearly Erroneous.

Even if Congress did not intend a more relaxed standard applicable to law enforcement personnel and the strict second prong of the *Tamiami* test is appropriate, the evidence below clearly demonstrated that current medical tests are inadequate to detect unqualified applicants over the age 40. The findings on test efficiency are contrary to the findings in similar cases upholding age as a BFOQ[16] and are not justified by any advances in medical testing. The combination of the strict BFOQ standard applied by the Court and the accepted evidence on test effectiveness, renders it impossible to establish age as a BFOQ for any occupation.

The courts below clearly erred in two respects. One, they misapprehended, contrary to the clear weight of the evidence, the efficiency of cardiovascular tests even in the "short-term" (*i.e.*, twelve months), and, secondly, the trial court's conclusion that current tests were 99% effective in predicting a heart attack within the next 12 months was incorrect in that it (a) considered only the short-term and (b) accepted the prediction of a heart attack within 12 months as meeting the employer's legitimate hiring criteria. Whether an applicant will suffer a heart attack within a certain period of time is simply irrelevant in terms of a law enforcement agency's hiring interests and in meeting the second prong of the *Tamiami* test. It is not a proper distinction between a qualified and unqualified applicant. A public safety employer should not be compelled to hire someone who may have heart disease merely because there is some assurance that the individual will not suffer a heart attack within a year.

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[16]*Usery v. Tamiami Trail Tours, Inc., supra; Hodgson v. Greyhound Lines, supra; Poteet v. City of Palestine, supra.*

It is beyond doubt that the circuit court believed that the predictability of a heart attack within the next 12 months was a valid criteria for job qualification. The circuit court stated "Dr. Mohler's testimony did not precisely address whether 99% of all persons with asymptomatic heart disease can be detected; . . . Rather, Dr. Mohler testified that the 'studies by Dr. Bruce of Seattle, Washington . . . have shown clearly by taking the various risk factors plus an exercise test response, one *can predict with greater than 99% accuracy that within the next 12 months that an individual will not have a cardiac event.*' This is not the same as saying that 99% of all asymptomatic sufferers will be detected." (emphasis by the Court) (Appendix A, p. 9).

The distinction noted by the Circuit Court in the last sentence was correct and that is precisely why such evidence is not a relevant BFOQ consideration.

The risk factors relied upon by the court do not increase the detection of cardiovascular disease. Rather, they allegedly serve as predictors of a possible future heart attack. Moreover, there is no credible evidence to support the finding that risk factor consideration provides flawless predictability in the short term. First of all, many of the risk factors, *i.e.*, smoking, family history, exercise habits, etc. are subjective and depend upon the veracity of the applicant. They are not in any sense a medical diagnosis or test.[17]

The County's cardiologist testified that this risk factor analysis was merely a guide to good health (RT 407) and of no specific value in a predictive sense for heart disease

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[17]The plaintiff's risk factor exhibit states that "The reaction of individual human beings to risk factors . . . is so varied it is impossible to draw valid conclusions for any individual. This scale has been developed only to highlight what risk factors are and what could be done about them. It is not designed to be a medical diagnosis." (Plaintiff Exhibit 12).

in an individual. He noted that for the age group 31-50 the risk point value for aging increases from 3 to 4 points when in actual experience the prevalence of heart disease in that age group goes up by a factor of about 20. (RT 450).

In sustaining the trial court's findings the appellate court noted an additional factor. The circuit court reasoned that despite the fact that 48% of asymptomatic sufferers of heart disease remain undetected, the second prong of the *Tamiami* test had not been met because the number was insignificant. The court, observing that approximately 3% of 35-year-olds suffer asymptomatic heart disease of which 52% can be detected by current tests stated:

> "The area of disagreement between the County and the EEOC is with the remaining 48% of the 3% of the 35-year-olds who suffer asymptomatic heart disease — in other words, the disagreement is over fewer than 1½% of 35-year-olds whose asymptomatic heart disease cannot be detected by administration of the EKG/CKG." (Appendix A, p. 9).

This position, of course, is contrary to the weight accorded medical tests in *Tamiami, supra, Hodgson, supra*, and *Murnane, supra*. Moreover, assuming that the number of persons with asymptomatic heart disease is only 3% at age 35, that is not the only age of concern to law enforcement agencies. With the invalidation of the County's age 35 limit, it cannot reject any applicants because of age even though the undisputed evidence showed that the prevalence of asymptomatic heart disease rises dramatically in the fourth and fifth decade of life. By a circuit court's reasoning, even if current cardiovascular tests could detect only 25% of asymptomatic sufferers, a highly inefficient test by anyone's standards, the second prong of the *Tamiami* test would still not be satisfied.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Court grant the Petition for Writ of Certiorari herein.

Executed this 24th day of August, 1983, at Los Angeles, California.

Respectfully submitted,

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APPENDIX A.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

Equal Employment Opportunity Commission, Plaintiff-Appellee, vs. County of Los Angeles, Defendant-Appellant. No. 82-5083. D.C. #CV 78-2522.

Filed: May 26, 1983.

Appeal from the United States District Court for the Central District of California.

Herbert Maletz,* District Judge, Presiding. Argued: October 8, 1982. Submitted: May 5, 1983.

Before: TANG and FERGUSON, Circuit Judges, and SOLOMON,** District Judge.

TANG, Circuit Judge.

The County of Los Angeles (the County) appeals from the district court's judgment finding the County in violation of the Age Discrimination in Employment Act, *as amended*, 29 U.S.C. § 631 *et seq.*, (ADEA). The central issue is whether the district court properly found that age under 35 is not a Bona Fide Occupational Qualification (BFOQ) for entry level employment of deputy sheriffs and fire department helicopter pilots.

There is no dispute that the policy and practice of the County is to reject applications of persons 35 years and above who seek positions as deputy sheriff or fire helicopter pilots, and that they are rejected solely on the basis of age.[1]

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*Judge of the United States Court of International Trade, sitting by designation pursuant to 28 U.S.C. § 293(b).

**Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

[1]The ADEA protects only persons between the ages of 40 and 70. 29 U.S.C. § 631(a). The district court found this to be of no consequence at trial, finding "no meaningful difference in the evidence as to an age limit of forth as opposed to thirty five." *E.E.O.C. v. County of Los Angeles*, 526 F. Supp. 1135, 1139 (C.D. Cal., 1981).

At trial and on appeal the main factual dispute concerned the effectiveness of available testing in identifying individuals who have asymptomatic cardiovascular disease. The County emphasized the increase in cardiovascular disease in the 40-50 age group and the difficulty of identifying employees at risk. EEOC emphasized that the real issue was the present physical condition of the applicants and emphasized the accuracy of certain tests, when considered with individual risk factors such as smoking, weight, family history, etc.

The district court found that readily available tests were 99% accurate as a "short term predictor of the likelihood of cardiac difficulty." 526 F. Supp. 1135, 1140. Based on this and other findings, the district court concluded that the County had failed to prove its BFOQ defense because "it is not impractical for defendant to differentiate the qualified from the unqualified applicants". *Id.*

I.

Legal Contentions

A. The County argues that the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), precludes application of the ADEA in this case, involving as it does essential public safety decisions by a local government.

This contention was rejected by the Supreme Court's recent decision in *E.E.O.C. v. Wyoming*, 103 S.Ct. 1054 (1983). That case involved a Wyoming Game and Fish Department supervisor's involuntary retirement at age 55 pursuant to Wyoming law. The Equal Employment Opportunity Commission (EEOC) sued on his behalf in district court, alleging an ADEA violation. The district court dismissed the suit, holding that under *National League of Cities v. Usery*, 426 U.S. 833 (1976), Congress was without power

to extend the ADEA to state law enforcement personnel, including game wardens. *E.E.O.C. v. Wyoming*, 514 F. Supp. 595, 600 (D. Wyo. 1981). The Supreme Court reversed, concluding that the ADEA "does not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.' " 103 S.Ct. at 1062. The only difference between the case before us and *E.E.O.C. v. Wyoming* is that this case involves a maximum hiring age and *Wyoming* a mandatory retirement age. Under an ADEA analysis, however, this difference is not significant because both involve age-based classifications. Thus, the County's challenge to the application of the ADEA to state or local government law enforcement occupations under *National League of Cities v. Usery* must fail.

B. The County also argues that because the ADEA applies to federal as well as state employment, any age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations.

Congressional authorization of the use of maximum hiring ages in federal law enforcement occupations, 5 U.S.C. § 3307(d), was recently upheld against ADEA attack in *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982). The County interprets *Stewart* as holding that Congress intended such authorization for age restrictions (in *Stewart*, maximum age 35 for entering federal law enforcement) to be an across-the-board exception to the ADEA. Because Congress intended the ADEA to apply equally to federal and state employment, the County argues, an exception to the ADEA or a BFOQ as a matter of law for state and local law enforcement maximum hiring ages must be recognized in this case.

The EEOC responds that the same Congress that enacted the federal maximum-hiring statute, 5 U.S.C. § 3307(d), extended the ADEA to state and local government employ-

ment. EEOC argues that because Congress failed to provide a *per se* exemption for state and local government hiring, none should be read into the ADEA. EEOC argues further that *Stewart*, relied on so heavily by the County, is not applicable to this case because *Stewart* involved the interpretation of the ADEA and 5 U.S.C. 3307(d) which only applies to federal employees.

The *Stewart* court was faced with "reconciling" 5 U.S.C. § 3307(d) with the ADEA. 673 F.2d 485, 490. *Stewart* held that § 3307(d) created an exception to the ADEA, and that no BFOQ was necessary to justify the maximum age entry requirements for federal law enforcement officers. *Stewart* did not address the question presented here, which is whether the ADEA can apply to similar federal, state, and local occupations differently.

The Court in *E.E.O.C. v. Wyoming*, however, apparently considered and rejected the argument raised here by the County. In discussing, the "well-defined federal interest in the [ADEA] legislation," the Court noted "incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers." 103 S.Ct. at 1064, n.17. Chief Justice Burger argued in dissent that the ADEA regulated the states in their capacity as states, that Wyoming's choice of who would serve as law enforcement officers was an attribute of sovereignty, and that the ADEA directly impaired the states' ability to structure integral operations. 103 S.Ct. at 1068-72 (Burger, C.J. dissenting). In the course of this discussion, Chief Justice Burger argued that "[I]t is not wholly without significance that Congress has not placed similar limits on itself in the exercise of its own sovereign powers." *Id.* at 1068. *See also id.* at 1069-70 (Burger, C.J., dissenting) (discussing Congressionally enacted exceptions to ADEA

for federal law enforcement officers); *id.* at 1071 (Burger, C.J., dissenting) (noting Congressional authorization for mandatory retirement in Armed Services and Foreign Service). Thus it is clear that the County's argument was before the Court in *E.E.O.C. v. Wyoming*, that the Court considered and rejected it, and that we must do likewise.

C. The County further argues that the district court's decision is against the great weight of authority recognizing age as a BFOQ in public safety occupations. The County argues that because it made the same factual record here as in other cases that have upheld age as a BFOQ, age as a BFOQ should have been recognized here. We held in *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982) that "a factual foundation is necessary to establish that age is a BFOQ." In *Santa Barbara* we stated, "[C]ourts cannot assume, in the absence of any evidence as to its effects on safe performance, that age, per se, constitutes a BFOQ." *Id.* at 377. Similarly, the court in *Stewart v. Smith, supra*, noted that the BFOQ "standard is highly sensitive to the factual record in individual cases," 673 F.2d at 491, n.26, and pointed to conflicting 4th Circuit and D.C. Circuit cases reaching opposite results on a maximum age hiring rule for pilots. Thus, we must look to the record in this case, and to the County's specific challenges based on this record, to evaluate the County's BFOQ position.

II.

Application of Proper BFOQ Standards.

A. The County argues that the district court improperly rejected economic considerations of the County in rejecting the county's BFOQ defense. The district court summarized the County's argument as follows:

> Defendant next contends that older persons will become unfit for these positions in a shorter time than

> younger persons . . . . This it is argued, will result in defendant receiving a less than optimal return on the initial training it provides its deputy sheriffs and helicopter pilots.

526 F. Supp. at 1140. The Court rejected this argument, citing *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 2299 (1982). We agree. "Economic considerations, however, cannot be the basis for a BFOQ — precisely those considerations were among the targets of the Act." *Id.* at 307.

B. The County argues that the district court applied an unduly strict construction of the BFOQ standard for public safety occupations, citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). The *Tamiami* standard has been adopted in this Circuit for Title VII and ADEA BFOQ defenses. *Harris v. Pan American Airways*, 649 F.2d 670 (9th Cir. 1981) (Title VII); *EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982) (ADEA). The standard requires that the job qualifications be "*reasonably necessary* to the essence of [the] business," and that either "all or substantially all" members of a class "would be unable to perform safely and efficiently the duties of the job involved," or "that it is impossible or highly impractical to deal with" the members of a class "on an individualized basis." *Harris*, 649 F.2d at 676, citing *Tamiami*, 531 F.2d at 236 and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

In applying the test, the district court found that the County had met his burden in establishing that strength, agility, good reflexes and ability to run appreciable distances and lift heavy objects were reasonably necessary to the jobs. 526 F. Supp. at 1139. The district court further found that "there is no strict relationship between age and physical ability," *id.* at 1139, and that physical performance tests

can easily distinguish those persons who possess the necessary physical attributes from those who lack them. *Id.*

The County's real concern, however, is its inability to assure itself that persons hired are not suffering from undetected heart disease.

The district court found that "all or substantially all persons above the age of forty years are not unable to meet defendant's health standards due to heart disease." *Id.* at 1140. The district court continued:

> considering that only an extremely small percentage of all persons currently barred by defendant's age restrictions are likely to have heart disease and go undetected by the available medical tests, the court concludes that in this regard it is not impractical for defendant to differentiate the qualified from the unqualified applicants. Thus on the second prong of the *Tamiami* test, defendant's age limit policy again fails to pass muster.
>
> Nor is this conclusion altered by the fact that a very small number of persons may conceivably go undetected. In the court's view, *Tamiami* requires only a practical reliable differentiation of the unqualified from the qualified applicant, 531 F.2d at 236, not a perfect differentiation.

Id.

The district court applied the BFOQ standard fairly. There was no error here.

C. The County argues that the district court placed too much emphasis on the fact that there are persons over age 40 working in the positions involved. The County emphasizes that this is a case involving maximum age for *initial hiring*, and not for the job itself. The challenged statement of the district court follows:

> Indeed, defendant currently employs numerous deputy sheriffs over forty years of age. Also, two of the nine

> helicopter pilots currently employed by the defendant are over forty. Given these considerations, the court finds it inexplicable that defendant refuses to consider for employment persons over thirty five years of age *who are satisfactorily employed in similar jobs by other government agencies*.

526 F. Supp. at 1139. (emphasis added) The County argued at trial that the experience gained by deputies hired at a young age makes up for the gradual decline in physical fitness that often accompanies the aging process. Despite this argument, the County has no provision to allow the hiring of persons over thirty-five who have extensive similar experience in other governmental agencies. It is clear that the district court's reference is to the contradiction inherent in the County's argument and its policy of not hiring even experienced 35 and over applicants. We read no more into the district court's statement.

D. The County argues that the following finding of the District Court is clearly erroneous and alone warrants reversal:

> Thus the simple electrocardiogram or cardiokymograph tests will detect 52% of all asymptomatic sufferers. Additionally, the evidence indicates that the Bruce protocol, a stress electrocardiogram test on an inclined treadmill, coupled with an analysis of the individual's risk factors (such as weight, smoking habits, family history, etc.) is 99% accurate as a short-term predictor of the likelihood of cardiac difficulty.

526 F. Supp. at 1140. The County argues that this passage shows that the trial court was confused by the evidence because the most effective readily available procedures, the EKG (electrocardiagram) and CKG (cardiokymograph) test are only able to detect 52% of all asymptomatic sufferers and that the risk factor analysis adds nothing to the procedure.

First, we must point out that the district court's ultimate conclusion was that "only an extremely small percentage of all persons over the age of thirty-five years applying for the jobs in question are likely to have asymptomatic heart disease and go undetected." 526 F. Supp. at 1140.

This was based on the figure (undisputed on appeal) that approximately 3% of 35 year olds suffer asymptomatic heart disease — heart disease whose symptoms are not readily apparent. It is also undisputed that 52% of this 3% can be detected by a combination of the stress EKG/CKG tests that are neither difficult nor prohibitively expensive to administer.

The area of disagreement between the County and the EEOC is with the remaining 48% of the 3% of 35 year olds who suffer asymptomatic heart disease — in other words, the disagreement is over the fewer than 1½% of 35 year olds whose asymptomatic heart disease cannot be detected by administration of the EKG/CKG.

The district court clearly credited the testimony of Dr. Mohler, one of the many expert witnesses who testified. Dr. Mohler's testimony did not precisely address whether 99% of all persons with asymptomatic heart disease can be detected; neither does the district court's reference to Mohler's testimony imply that it did. Rather, Dr. Mohler testified that the "studies by Dr. Bruce of Seattle, Washington . . . have shown clearly by taking the various risk factors plus an exercise test response, *one can predict with greater than 99 percent probability that within the next twelve months that an individual will not have a cardiac event.*" RT 774 (emphasis added). This is not the same as saying that 99% of all asymptomatic sufferers will be detected. There is no evidence that the district court was confused, and we decline to reverse on this point.

The district court's conclusion that the County failed to establish a BFOQ is based on findings that are not clearly erroneous.

AFFIRMED.

APPENDIX B.

Opinion.

United States District Court, Central District of California.

Equal Employment Opportunity Commission, Plaintiff, v. County of Los Angeles, Defendant. Civil Action No. 78-2522 — LTL.

Filed: November 24, 1981.

Samuel Dashiell, Regional Attorney, Robert T. Olmos, Supervisory Trial Attorney, Martin K. Magid and Christine Masters, Trial Attorneys, Equal Employment Opportunity Commission, for plaintiff.

John H. Larson, County Counsel, and William F. Stewart, Chief, Labor Relations Division, for defendant.

MALETZ, Judge:[1] This is an action challenging the County of Los Angeles' policy of not hiring persons over the age of thirty five for entry level positions as Deputy Sheriff[2] in the County Sheriff's Department or as Helicopter Pilot in the County Fire Department. Plaintiff, the Equal Employment Opportunity Commission, alleges that this policy constitutes a violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (hereafter ADEA).[3]

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[1]Of the United States Court of International Trade sitting by designation.

[2]Deputy Sheriffs of the County of Los Angeles serve as law enforcement officers for various areas of the County outside of the City of Los Angeles. They also serve as correction officers for the County.

[3]29 U.S.C. § 623(a) provides:

> (a) It shall be unlawful for an employer
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

29 U.S.C. § 623(f)(1) contains a Bona Fide Occupational Qualification exception which provides:

> (f) It shall not be unlawful for an employer . . .
>
> (1) to take any action otherwise prohibited under subsection (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

Briefly described, the defendant County of Los Angeles' policy is not to consider any applicant over thirty five years of age for these jobs regardless of his qualifications for the position and regardless of how many years he may have been satisfactorily employed in a similar position by a different employer.

At the outset, defendant, relying upon *National League of Cities v. Usery*, 426 U.S. 833 (1976), argues that the Tenth Amendment to the Constitution bars the application of the ADEA to defendant's hiring policies. In *National League of Cities*, the Supreme Court held that the application of federal minimum wage and overtime provisions to the states and their political subdivisions would impermissibly interfere with traditional aspects of state sovereignty in violation of the Tenth Amendment. Such regulation by Congress of a state as an employer, pursuant to Congress' power under the Commerce Clause, the Court concluded, is barred by the Tenth Amendment.

However, in enacting the ADEA and extending it to the states and their political subdivisions, Congress exercised its power to prohibit discrimination pursuant to section five of the Fourteenth Amendment. *Arritt v. Grissell*, 567 F.2d 1267 (4th Cir. 1977). This is important because Congress' power under the Fourteenth Amendment to regulate a state's employment practices is not limited by the strictures of the Tenth Amendment upon which *National League of Cities* is grounded. See, *Ex Parte Virginia*, 100 U.S. 339, 446-48 (1879); *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978); *Arritt v. Grissell, supra; Usery v. Charleston Cty Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977). On this basis the courts after *National League of Cities* have repeatedly upheld federal regulation of a state's or its political subdivision's employment practices. See, e.g., *Fitzpatrick v.*

Bitzer, 427 U.S. 445 (1976); *Marshall v. City of Sheboygan, supra; Arritt v. Grissell, supra; Usery v. Charleston Cty Sch. Dist., supra*. Thus the court concludes that the Tenth Amendment does not bar the application of the ADEA to the defendant.

Defendant next points out that entry level Federal Bureau of Investigation agents, postal inspectors and firefighters must be under thirty five years of age. That age limit is authorized pursuant to 5 U.S.C. § 3307(d) which provides:

> (d) The head of any agency may, with the concurrence of such agent as the President may designate, determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer or firefighter, as defined by Section 8331(20) and (21), respectively, of this title.

In defendant's view, section 3307(d) and the federal age limits currently in force indicate that an age limit of thirty five years is a bona fide occupational qualification (BFOQ) for law enforcement and firefighting positions.

The problem with this argument is that although section 3307(d) authorizes entry level restrictions for certain jobs, it does not *require* the adoption of any restriction. And most importantly, that statutory provision neither authorizes nor approves the *specific* age restrictions currently in force. Nor, contrary to defendant's claim, is there any case support for the proposition that section 3307(d) establishes the age limit of thirty five years as a BFOQ. Defendant relies on *Stewart v. Civiletti*, 25 FEP Cases (BNA) 1702 (D.D.C. Dec. 14, 1979. However, in that case the court upheld an entry age limitation for clerical employees not on the basis that an age limitation of thirty five constituted a BFOQ, but on the basis that the employees were law enforcement personnel within the meaning of section 3307(d). *Thomas v. U.S.*

Postal Inspection Service, 647 F.2d 1035 (10th Cir. 1981) — also relied on by defendant — merely determined that a federal entry age restriction was not unconstitutional. And *Bowman v. U.S. Dept. of Justice*, 510 F. Supp. 1183 (E.D. Va. 1981), concerned the validity of a retirement provision and not section 3307(d).

These considerations aside, defendant concedes that its refusal to hire persons over the age of thirty five years constitutes a prima facie violation of the ADEA which will entitle plaintiff to relief unless that age limitation policy constitutes a BFOQ.

In order for that policy to constitute a BFOQ, it must first be shown that "the job qualifications invoke[d] to justify . . . [the] discrimination . . . [are] *reasonably necessary* to the essence of [the] business . . . ." [Emphasis in original.] *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). In the present case, there is no dispute that defendant's job qualifications for health, strength, agility and physical performance are reasonably necessary.

In addition, defendant's age limitation can pass muster as a BFOQ only if the evidence shows *either* (1) that all or substantially all persons above that age are unable to meet defendant's health and physical performance standards; *or* (2) that there is no practical way to differentiate qualified from unqualified applicants among persons over the age cutoff. *Tamiami*, 531 F.2d at 235-7.[4]

Preliminarily, the parties disagree as to who has the burden of proof on the issue of whether age is a BFOQ. Relevant on that issue is *Texas Dept. of Community Affairs v. Bur-*

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[4]Defendant maintains that because the ADEA only applies to persons over the age of forty (29 U.S.C. § 631) the evidence need only show that an age cutoff of forty is justifiable. The point is of no consequence, however, since there was no meaningful difference in the evidence as to an age limit of forty as opposed to thirty five.

dine, 101 S. Ct. 1089 (1981). In that case, the Supreme Court outlined the respective burdens of the plaintiff and defendant on the question of the establishment of a BFOQ under Title VII of the Civil Rights Act of 1974 (*id.* at 1093):

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [Citations omitted.] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Although *Burdine* involved Title VII of the Civil Rights Act of 1964 and not the ADEA, the language of the BFOQ provision of Title VII is virtually identical to the corresponding language of the ADEA. Compare 42 U.S.C. § 2000e-2(e) with 29 U.S.C. § 623(f)(1) of the ADEA. Given this similarity between Title VII and the ADEA, the Ninth Circuit has recently applied the teaching of *Burdine* to the ADEA. *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981).

In conformity with *Burdine* and *Douglas v. Anderson*, this court concludes that upon defendant's articulation of legitimate, nondiscriminatory reasons for its age restriction, the burden of proof as to whether age is a BFOQ lies with the plaintiff.

Against this background, defendant's first contention as to why age should be considered a BFOQ here is that persons over the age of forty years would be unable to adequately perform the tasks required by the jobs in issue. It is beyond dispute that these jobs are physically arduous and require

strength, agility, good reflexes and the ability to perform such tasks as the running of appreciable distances and the lifting of heavy objects.

The evidence showed that as a general matter younger persons more often possess such characteristics and are more often able to perform such tasks than older persons. Nevertheless, as defendant concedes, qualified persons hired for these positions before they reach the age of thirty five are able to continue satisfactorily well beyond that age. Indeed, defendant currently employs numerous deputy sheriffs over forty years of age. Also, two of the nine helicopter pilots currently employed by the defendant are over forty. Given these considerations, the court finds it inexplicable that defendant refuses to consider for employment persons over thirty five years of age who are satisfactorily employed in similar jobs by other government agencies.

What is more, the record establishes that there is no strict relationship between age and physical ability. Thus, the overwhelming weight of the evidence demonstrates that many persons over the age of forty are capable of physically outperforming many persons under the age of forty years. Indeed, many persons over the age of forty possess the physical strength, agility and other characteristics needed for these jobs, while many persons under the age of forty lack these characteristics. The evidence also shows that persons lacking such characteristics may easily be distinguished from those possessing them by the use of simple, inexpensive and extremely reliable physical performance tests. This being the case, the general correlation between age and physical ability cannot serve as a justification for defendant's age restriction policy.

Defendant maintains though that age should be considered a BFOQ because of the generally higher rate of heart disease among older persons. In particular, defendant claims that

abandonment of its age limitation would result in an increase in its hiring of persons suffering from undetected heart disease.

It is not disputed that a certain percentage of persons genuinely suffering from heart disease do not manifest such readily apparent symptoms as chest pain. The evidence indicates that the rate of such asymptomatic heart disease is approximately three percent among thirty five year olds. These figures do not, however, reflect defendant's actual risk of hiring asymptomatic sufferers of heart disease should its age restriction be voided. This is because such disease may in fact be detected by various medical procedures. Thus, simple electrocardiogram and cardiokymograph tests will detect 52 percent of all asymptomatic sufferers. Additionally, the evidence indicates that the Bruce Protocol, a stress electrocardiogram test on an inclined treadmill, coupled with an analysis of the individual's risk factors (such as weight, smoking habits, family history, etc.) is 99 percent accurate as a short term predictor of the likelihood of cardiac difficulty. All of these tests are inexpensive and easy to administer. Thus, only an extremely small percentage of all persons over the age of thirty five years applying for the jobs in question are likely to have asymptomatic heart disease and go undetected.

Applying the first prong of the *Tamiami* test to these facts, it is apparent from the record that all or substantially all persons above the age of forty years are not unable to meet defendant's health standards due to heart disease.

Turning to the second prong of the test, and considering that only an extremely small percentage of all persons currently barred by defendant's age restrictions are likely to have heart disease and go undetected by the available medical tests, the court concludes that in this regard it is not

impractical for defendant to differentiate the qualified from the unqualified applicants. Thus on the second prong of the *Tamiami* test, defendant's age limit policy again fails to pass muster.

Nor is this conclusion altered by the fact that a very small number of persons may conceivably go undetected. In the court's view, *Tamiami* requires only a practical reliable differentiation of the unqualified from the qualified applicant, 531 F.2d at 236, not a perfect differentiation.

Defendant next contends that older persons will become unfit for these positions in a shorter time than younger persons. It stresses the evidence in the record indicating that the risk of heart disease increases with age. In essence, defendant's argument is that a voiding of its age policy will saddle it with an older work force which will more rapidly become unfit for the jobs in issue due to physical unfitness and heart disease. This, it is argued, will result in defendant receiving a less than optimal return on the initial training it provides its deputy sheriffs and helicopter pilots.

What the evidence showed, however, was that physical unfitness for these positions did not follow inexorably from the aging process. Thus, as a person grows older, physical fitness for the positions can be maintained by exercise and the control of weight gain. And as noted earlier, defendant currently employs a large number of deputy sheriffs over the age of forty who are performing satisfactorily.

Essentially these same arguments were rejected in *McMahan* v. *Barclay*, 510 F. Supp. 1114 (S.D.N.Y. 1981). There the district court considered a hiring age limit of twenty nine years of age for police officers. While *McMahan* was decided on constitutional grounds, the court's discussion of whether age constitutes a BFOQ for police officers is applicable here (*id.* at 1116):

> Before this Court, defendants advance the contention that the statute is valid as imposing a bona fide occupational qualification. However, the only justification offered for this contention is: (1) that younger police can serve for a longer period of time after being trained than older recruits and (2) younger recruits will remain physically fit for longer periods of time. Were the Court to accept these justifications for imposing an age barrier of 29, little would be left of the concept that age discrimination, without some showing of a real need therefor, is impermissible. The argument that the investment in training younger recruits is more likely to be recouped than that in the training of older persons would negate the entire concept of protection against age discrimination. Obviously, this is a contention equally available to any employer of persons who must receive training.

And as the Fourth Circuit recently stated in *Smallwood v. United Air Lines*, ___ F.2d ___, Slip Op. Oct. 8, 1981 at 9, "economic considerations . . . cannot be the basis for a BFOQ — precisely these considerations were among the targets of the act."

Of course, given the fact that the ADEA has made age discrimination generally unlawful, defendant cannot prevail unless there is something distinctive about the jobs at issue here that makes age a relevant consideration. In this regard, defendant stresses the fact that the employer here is a public body and that any increment in cost associated with a voiding of its policy will therefore have to be met with public funds. This argument cannot be accepted in view of the action of Congress in 1974 specifically extending the ADEA to the states and their subdivisions. 29 U.S.C. § 630(b).

Defendant also emphasizes the public safety aspect of the jobs in issue here and once again relying upon evidence of increased incidence of heart disease among older persons

argues that its policy minimizes the risk of employees being debilitated by a heart attack while responding to an emergency. In pursuing this argument, the defendant relies upon cases upholding entry age restrictions for inter-city bus drivers and airline pilots. See *Tamiami*, 531 F.2d 224 (bus drivers); *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) (bus drivers); *Murnane v. American Airlines*, 482 F. Supp. 135 (D.D.C. 1979) (airline pilots) but compare *Smallwood v. United Airlines, supra*. Police work, of course, concerns the safety of third persons but does not entail the direct and continual reliance of a large number of persons upon the individual officer's moment to moment physical vitality. Equally important, the record, as indicated previously, demonstrates that an individual's risk of suffering a heart attack is highly predictable.

Given the facts established at trial, the court concludes that plaintiff has met its burden of proving that age does not constitute a BFOQ for the jobs here at issue and that defendant's age limit for hiring violates the ADEA. *Accord. EEOC v. County of Allegheny*, 519 F. Supp. 1328 (W.D. Pa. 1981).[5]

Pursuant to rule 58 of the Federal Rules of Civil Procedure, the parties shall submit within 15 days a proposed form of judgment.

/s/ Herbert N. Maletz
Herbert N. Maletz, Judge

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[5]In the *Allegheny* case, the district court held that the policy of the County of Allegheny in refusing to consider applicants over the age of thirty five for positions as police officers violates the ADEA.

APPENDIX C.

Judgment.

United States District Court, Central District of California.

Equal Employment Opportunity Commission, Plaintiff, v. County of Los Angeles, Defendant. Civil Action No. 78-2522 HM.

Filed: December 17, 1981.

This action having been heard before this Court on October 8, 1980, the issues having been duly tried, and a decision having been rendered by this Court,

IT IS NOW, THEREFORE, ORDERED AND ADJUDGED:

1. The maximum entry hiring limitation of age of thirty-five for the positions of Entry Level Deputy Sheriff and Helicopter Pilot, Fire Services, utilized by Defendant, County of Los Angeles, violates the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* and in particular, §§ 626(b) and (e);

2. Defendant, its agents, successors, officers, employees, and those acting in concert with it or at its direction should be, and they hereby are, permanently restrained and enjoined from continuing or maintaining the policy, practice, custom, and usage of limiting employment of applicants for the positions of Entry Level Deputy Sheriff and Helicopter Pilot, Fire Services, to those individuals who have not yet attained the age of thirty-five (35).

3. Defendant, its agents, successors, officers, employees, and those acting in concert with it or at its direction are hereby ordered to identify within thirty (30) days those individuals over the age of thirty-five (35) who applied and were rejected for employment as Entry Level Deputy Sheriff

or Helicopter Pilot, Fire Services, during the period from January, 1978 to the present; names and addresses of those applicants so identified must be provided to the Equal Employment Opportunity Commission within ten (10) days of such identification. Furthermore, Defendant, its agents, successors, officer, employees, and those acting in concert with it or at its direction are hereby ordered to notify the individuals so identified of the outcome of this lawsuit; to process applications of such individuals through normal personnel procedures without regard to the age of the applicant; and to accept into employment in the next available openings those individuals who are otherwise qualified for said positions. A list of individuals accepted into employment by Defendant must be provided to the Equal Employment Opportunity Commission within ten (10) days of such acceptance.

4. Defendant, its agents, successors, officers, employees, and those acting in concert with it or at its direction should be, and they hereby are, permanently restrained from treating individuals hired after age thirty-five in the subject positions in an adverse manner because of age or because such hiring was required by this Judgment.

5. Defendant, its agents, successors, officers, employees, and those acting in concert with it or at its direction should be, and they hereby are, ordered to communicate to employees in the Sheriff's Department and the Fire Services Department the fact that the entry age restriction of thirty-five years violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, and that such restriction will no longer be utilized by Defendant.

6. Defendant, its agents, successors, officers, employees, and those acting in concert with it or at its direction should be, and they hereby are, permanently restrained and enjoined from printing or publishing any reference to, or

hiring limitation because of, an applicant's age in its advertisements, job announcements, or other documents used to inform potential applicants of vacancies in the subject positions.

7. Defendant shall pay Plaintiff all costs herein allowable by law incurred and expended by Plaintiff, and Plaintiff shall have execution therefor.

This Court shall retain jurisdiction of the action following entry of this Judgment to insure that the provisions herein contained are implemented accordingly.

Dated: December 17, 1981

/s/ Herbert N. Maletz
HERBERT MALETZ
UNITED STATES DISTRICT JUDGE
/s/ Sitting by Designation

Approved as to form:
JOHN LARSON, County Counsel
By /s/ William F. Stewart
WILLIAM F. STEWART
Chief, Labor Relations Division
COUNTY OF LOS ANGELES

Presented by:
SAMUEL DASHIELL
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By /s/ Christine Masters
CHRISTINE MASTERS
Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

No. 83-332

IN THE

Supreme Court of the United States

October Term, 1983

COUNTY OF LOS ANGELES,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Pursuant to Rule 22.6, the Petitioner herein files this supplemental brief for the purpose of bringing to the attention of the Court a new case recently decided and not available at the time of filing of the original Petition for Writ of Certiorari on August 24, 1983. The case is *EEOC v. University of Texas Health Science Center*, ___ F.2d ___, 32 FEP Cases 944 (CA 5, 1983) and is printed as Appendix A.

One of the reasons stated for granting the Petition for Writ of Certiorari herein was that the decision of the Ninth Circuit was in conflict with decisions in other circuits. Since the filing of the brief on August 24, the decision of another circuit has been published which petitioners believe is contrary to that of the Ninth Circuit in the case at bar.

On August 1, 1983 (reported in the August 20 edition of BNA Labor Relations, 32 FEP Cases 944 Reporter), the Fifth Circuit in *EEOC v. University of Texas Health Science Center*, ___ F.2d ___, 32 FEP Cases 944 (CA 5, 1983) upheld the district court's determination that the age limit of 45 for initial employment as a University of Texas campus police officer was a BFOQ under the Age Discrimination in Employment Act (hereinafter the ADEA). The Fifth Circuit, as did the Ninth Circuit in the case at bar, relied upon the BFOQ standard set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) but reached the opposite conclusion upon the same facts.

From the facts stated in the decision it is apparent that the EEOC raised the same legal and factual contentions and presented similar evidence as in the instant case. The defendants in *EEOC v. University of Texas Health Science Center*, however, successfully maintained that age 45 was a BFOQ under the ADEA because the campus police officer's duties were physically similar to those of law enforcement officers employed by city and federal police agencies also imposed maximum hiring age limits (*e.g.*, El Paso Police Department (29), Austin and Houston Police Departments (35) and the FBI and U.S. Marshall's Office (35)).

The circuit court upheld the finding that the University had a reasonable factual basis for believing that all or substantially all persons over 45 would be unable to perform safely and efficiently the duties of the job and that it was impossible or impractical to deal with persons over that age limit on an individualized basis. The court relied upon testimony presented by defendants, not dissimilar to that presented by the petitioner herein, that older officers are less adept at handling the duties of a campus patrolman and that medical testing cannot accurately screen applicants on an individualized basis. As noted by the circuit court, "[a]

theme of the defendant throughout the trial was that the duties of campus police officers are the same or similar to those of other law enforcement officers who work for employers that impose considerably lower hiring ceilings." (Appendix A, p. 4)

It is clear that the Fifth Circuit applied the *Tamiami* standard in a less exacting manner than did the Ninth Circuit, the circuit court specifically recognizing that where public safety is concerned the BFOQ standard is not as stringently applied. (See concurring opinion of Judge Higginbotham, Appendix A, p. 13.) Moreover, the circuit court found that individual testing as urged by the EEOC was inadequate to dispel age as a BFOQ.

The University of Texas decision supports another ground urged for granting the petition herein. It is clear that in cases involving the same police duties, either state or federal, misinterpretation of the BFOQ exemption of the ADEA has resulted in the lower courts reaching divergent results on the same facts contrary to Congressional intent. If a maximum hiring age limit for a campus police officer at the University of Texas is a BFOQ under the ADEA, and if age limits for federal law enforcement and related occupations does not violate the ADEA, there is no justification for, nor did Congress intend, prohibiting the Los Angeles County Sheriffs Department, the largest metropolitan department in the United States with over 5,000 sworn officers from maintaining similar age limits.

Respectfully submitted,

DONALD K. BYRNE,
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WILLIAM F. STEWART,
Chief, Labor Relations Division
Attorneys for Petitioner.

APPENDIX A.

Opinion of the U.S. Court of Appeals, Fifth Circuit (New Orleans).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, No. 82-1216, August 1, 1983.

Appeal from the U.S. District Court for the Western District of Texas. Affirmed.

Michael J. Connolly, General Counsel, Gretchen D. Huston, Acting Associate General Counsel, and Raymond R. Baca, for appellant.

Mark White, Attorney General of Texas, and Laura Martin, Assistant Attorney General, for appellee.

Before GEE, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

Full Text of Opinion

REAVLEY, Circuit Judge: — The Equal Employment Opportunity Commission challenges the policy of the University of Texas of refusing to hire for initial employment commissioned campus police officers beyond the age of forty-five. The trial court concluded that the age restriction was a bona fide occupational qualification (BFOQ) and hence legal under the Age Discrimination in Employment Act (ADEA). We affirm.

I.

The University of Texas System consists of some fourteen institutions around the state. Under its current rules it will not consider applications of individuals seeking employment as beginning commissioned campus officers who have passed their forty-fifth birthdays. Commissioned officers are armed and authorized to conduct criminal investigations and make

arrests. The age restriction does not apply to non-commissioned officers, who are assigned to direct traffic and guard buildings and parking lots, but are not armed or authorized to make arrests. Commissioned officers, once hired, may continue to work past their forty-fifth birthdays, though older officers typically assume administrative or supervisory roles through promotion.

Frank Price was hired as a campus police officer at Arkansas State University in August of 1973. In 1975, at the age of forty-six, he applied for an announced campus police officer vacancy at the University of Texas Health Science Center at San Antonio. He was told that he was ineligible for the job because of his age. He filed a complaint with the Department of Labor, then responsible for enforcing the ADEA, and this suit followed, seeking an end to the university policy and back wages owed to all victims of the alleged violations. The Equal Employment Opportunity Commission (EEOC or Commission) was later substituted as the current enforcement agency.

II.

Section 4(a) of the ADEA, 29 U.S.C. § 623(a), prohibits employer discrimination on the basis of age. The Act covers employment practices of state agencies such as the one here. 29 U.S.C. § 630(b); *EEOC v. Wyoming*, ___U.S. ___, 103 S.Ct. 1054, 75 L.Ed.2d 18, 31 FEP Cases 74 (1983). The university concedes that its hiring restriction distinguishes applicants on the basis of age, but defends the policy as a BFOQ.

Section 4(f) of the ADEA, 29 U.S.C. § 623(f), establishes as a statutory exception that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section where age is a bona fide occupational qualification reasonably necessary to the normal operation

of the particular business . . . .'' This circuit employs a two-prong legal test in determining whether an age classification qualifies as a BFOQ: (1) the classification must be reasonably necessary to the essence of the employer's business; (2) the employer must have reasonable cause, that is, a factual basis, for believing *either* that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job *or* that it is impossible or impractical to deal with persons over the age limit on an individualized basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36, 12 FEP Cases 1233 (5th Cir. 1976).

The burden of proof is on the employer to establish the BFOQ defense. *Id.* at 235. On appeal, a circuit court may of course fully and freely review whether the trial court applied the correct legal test, in this instance the Tamiami test. However, as long as the court below asked the right legal questions, its findings under each prong of the Tamiami test are findings of fact and are reversible only if clearly erroneous. *Id.* at 226, 233, 238; *EEOC v. City of St. Paul*, 671 F.2d 1162, 1166, 28 FEP Cases 312 (8th Cir. 1982); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 305, 307, 26 FEP Cases 1655 (4th Cir. 1981), cert. denied, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302, 28 FEP Cases 1656 (1982); Fed.R.Civ.P. 52(a). Cf. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66, 28 FEP Cases 1073 (1982). In this case, the trial court made express reference to Tamiami in concluding that the defendant had established its age qualification as a BFOQ. The court also made numerous findings of fact which fall neatly within each prong of the Tamiami test. Reviewing these findings under the clearly erroneous standard, we find ample and respectable evidence presented by both sides in the record, but cannot say that any finding ''is so against the

great preponderance of the credible testimony that it does not reflect the truth of the case," *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1341 (5th Cir. 1981), cert. dismissed, 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982), or that we are "left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948).

At trial, both the EEOC and the state elicited testimony from experienced and intelligent witnesses concerning the duties of campus police officers and the effects of aging on the ability of individuals to perform those duties. The EEOC presented testimony that older officers can handle the job as well or better than their younger counterparts, and that the duties of campus police officers are not as strenuous as those of other police jobs where even stricter age requirements are imposed. The EEOC also offered evidence that individualized testing of older applicants to determine job fitness is both medically feasible and financially practical. The state presented evidence, less voluminous but in our view no less credible, that older officers are less adept at handling the duties of a campus patrolman, and that medical testing cannot accurately screen applicants on an individualized basis. A theme of the defendant throughout the trial was that the duties of campus police officers are the same or similar to those of other law enforcement officers who work for employers that impose considerably lower hiring ceilings. The testimony on both sides ranged from anecdotal accounts by campus officers to technical opinions by doctors specializing in geriatrics and gerontology. Rather than summarize here all of the evidence presented, we concentrate on the evidence as it relates to the arguments raised on appeal.

III.

The Commission argues that the age requirement is not reasonably necessary to the essence of the job, as required by the first prong of Tamiami. The district court found, and there appears to be no dispute, that "[t]he business of the University Police Department is the protection of students, staff, faculty and public safety of all persons on or near the campuses of the University of Texas System. This job involves preserving the peace, effecting arrests and suppressing crime." In concluding that the defendant had established a BFOQ, the court found "based upon the testimony of Carl Page, M.D., of Lubbock, Texas, that there is a deterioration both physiologically and psychologically which is contributable to the process of aging," and that "age statistically proved to be a prominent factor in one's individual physical condition." The court further found that "[t]he public safety of all persons on or near campus of the University of Texas System could be endangered to some degree by hiring persons as beginning peace officers if they were not commissioned prior to their forty-fifth birthday," and that "[t]he health of an average individual, 45 years or older, could be endangered in the performance of the duties of being a newly commissioned peace officer within the University of Texas police system."

We agree with the Commission that general evidence on the truism that all people deteriorate physically with age cannot by itself establish a BFOQ in this case. The statutory requirement is that the age qualification be "reasonably necessary to the normal operation of the *particular* business." 29 U.S.C. § 623(f)(1) (emphasis added). See also *EEOC v. City of St. Paul*, 671 F.2d 1162, 1168, 28 FEP Cases 312 (8th Cir. 1982) (evidence on general debilitating effects of age is insufficient to establish a BFOQ). Some showing is required that the specific age qualification chose

is reasonably necessary to the viability of the business because of particular job skills that older applicants lack. Likewise, we agree that offhanded, subjective opinions by hiring officials that older applicants cannot handle the job are not by themselves sufficient to justify age restrictions, since holding that such opinions are determinative would condone "precisely the stereotypical thinking that the ADEA was designed to prevent." Tamiami, 531 F.2d at 234. Instead, the defendant must demonstrate a specific, objective, or factual basis for its hiring qualifications based on age. With these standards in mind, we cannot say that the trial court's findings are clearly erroneous, even though the EEOC presented considerable evidence in opposition to the BFOQ defense.

[1] On appeal as at trial, the university justifies its hiring limit on two grounds: (1) older individuals lack the acute physical and mental agility and stamina required to serve effectively as rookie campus officers; (2) younger officers are more qualified because they "relate" better to the youthful constituency encountered on college campuses.

There was consistent testimony at trial that physical strength, agility and stamina are important to the training and performance of campus policemen. George Hess, Jr., chief of police at the University of Houston, indicated on cross-examination that physical training is a very important aspect of training a police officer. Dr. Carl Page, a physician, testified that forty-five is an unwise age for an individual to start as a rookie policeman because his changes of being injured, developing joint problems, or having coronary disease or strokes would be greater than for a twenty-five or thirty-five year old policeman, and that the older officer would lack the physical stamina and prowess of a younger officer. Plaintiff's witness Donald Cannon, chief of the University of Texas Police Department at Austin,

stated on redirect examination that a street officer's reliability diminsihes considerably with age, and admitted on recross-examination that five of his officers under the age of forty-five had been assaulted the previous year, and that one probably would not have survived had he been an older officer. Frank Cornwall, director of police with the University of Texas System, indicated that the training and daily routine of his officers is strenuous, and Maurice Harr, chief of police at the University of Texas Medical Branch at Galveston, endorsed the hiring ceiling because the campus police job requires stamina and the ability to remain afoot for eight hours, cover an assigned beat, and perform individually. Dr. Paul Richard Jeanneret, a management consultant, industrial psychologist and former policeman, had conducted extensive personnel studies for the Houston Police Department and the Texas Department of Public Safety, both of whom have hiring ceilings of thirty-five. He testified that these age requirements were recommended and justified because supervisory skills, proficiency at pursuit driving, physical agility and marksmanship declined when troopers approached the age of forty or forty-five. In response to a hypothetical question, he testified that a hiring age of forty-five is too high if the duties and physical and psychological stress imposed on a campus policeman are the same as those imposed on an officer with the Department of Public Safety or a city police force. Numerous witnesses testified that the job of campus policeman is similar to that of a city policeman, and that campus police officers conduct joint operations with city officers. Several officers testified that the campus job is if anything more difficult and stressful, because of crowd control problems, the need to exercise restraint with students in a college setting, and the special problems confronted by university medical schools in treating mental patients and inmates. Evidence was presented

that the maximum hiring age for policemen was twenty-nine for the city of El Paso and thirty-five for the cities of Austin, Houston and for the United States Marshal's Office, Border Patrol, Drug Enforcement Administration and the FBI.

The state also relied on testimony that younger officers are needed to understand and relate to potential offenders and to prevent minor occurrences from erupting into major ones. Chief Cannon stated that commissioned officers must take sixty hours of college credit to acquaint themselves with student pressures and problems. Mr. Cornwall stated that younger officers are better able to handle frequent confrontational episodes on campus because of their ability to relate to youthful offenders. The EEOC argues that the alleged inability of older officers to relate to college students does not justify the age qualification because it is not reasonably necessary to the essence of the employer's business, as required under the first prong of the Tamiami test. The Commission relies on *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 337 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267, 3 FEP Cases 1218 (1971), a sex discrimination case. There we held that an airline could not justify hiring only female flight attendants on grounds that females better served the "psychological needs" of passengers and were overwhelmingly preferred by them, since these non-mechanical functions were tangential to the essential and primary function of providing safe transportation. In the present case, assuming that the trial court relied on the evidence concerning the ability of younger officers to relate to students, Diaz is clearly distinguishable. Here the asserted ability of younger officers is in no way tangential to their primary task of insuring the safety and protection of the campus community and preserving order.

[2] The Commission asserts that the hiring ceiling was arbitrarily chosen for reasons having nothing to do with ability to perform the job. It points to testimony of Mr. Cornwall that the ceiling was raised from age forty-one to forty-five because the university was having difficulty filling certain posts, and hoped to attract persons retiring from city police forces and the military. This argument incorrectly suggests that the ability of individuals to perform effectively can never be balanced against the need to fill vacancies. the overall effectiveness of any police force obviously depends on both the quality and number of its individual members. Furthermore, raising the ceiling from forty-one to forty-five for the purpose of filling vacancies suggests, if anything, that the ceiling is too *high* as a measure of individual fitness for the job, and the record is clear that the new ceiling was not arbitrarily picked out of a hat, but was chosen after extensive conferences, discussions and studies of relevant police journals by the campus police chiefs. Moreover, we are extremely indisposed to read an intent requirement into the Tamiami test. While the wording of previous cases can be read in different ways, we think it wiser to interpret the test as requiring the defendant to demonstrate *at trial*, with *objective* evidence, that the age qualification is justified, rather than looking to the subjective motivation originally behind the qualification. Motivation or intent analysis plays a role in some discrimination cases. See, *e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 277, 102 S.Ct. 1781, 1784, 72 L.Ed.2d 66, 72-73, 28 FEP Cases 1073 (1982) (challenge to seniority system under Title VII requires showing of intent to discriminate racially); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597, 607, 12 FEP Cases 1415 (1976) (constitutional challenge to hiring examination requires showing of racially discriminatory purpose). Typically, intent requirements disfavor

plaintiffs because they are extraordinarily hard to meet; proving up the collective intent of a giant state institution as we have here is particularly difficult and uncertain. We therefore interpret Tamiami's requirements for an age BFOQ as not inviting judicial safaris into the overgrowth of human motivation and intent.

IV.

Under the second prong of Tamiami, the defendant must demonstrate either that all or substantially all applicants over age forty-five are unable to perform safely and efficiently the duties of the job, or that it is impossible or impractical to deal with persons over forty-five on an individualized basis. Evidence presented at trial supports each alternative.

The Commission maintains that the university system's policy of allowing officers hired before their forty-fifth birthday to work beyond age forty-five is proof that at least some older officers can handle the job. The fact that previously hired employees are allowed to work past the initial hiring age does not by itself defeat a BFOQ. In Tamiami, such a condition did not compel this court to reverse the district court's upholding of a BFOQ. Indeed, the district court in that case upheld a hiring ceiling of forty for bus drivers even though it also found that statistically the safest driver was one between ages fifty and fifty-six with sixteen to twenty years experience. 531 F.2d at 233-34, 238 n. 32. Were we to accept the Commission's argument, the hiring ceiling would always have to coincide with the mandatory retirement age for any particular job. The university's position is that the demands of a rookie officer are physically greater than those of officers with seniority.

The trial court found: "The University System employs individuals prior to their forty-fifth birthday, however, substantially, all of the officers over the age of forty-five years

of age do administrative work in contrast to the more strenuous work of patrol, because they have by virtue of their seniority achieved the rank of sergeant, lieutenant or higher." The testimony indicated that due to high turnover, patrolmen can generally expect to be promoted to sergeant in three to four years. Sergeants and lieutenants are considered supervisors, who direct the activities of the patrolmen or street officers. Chief Bratton testified that none of his patrolmen were over the age of forty-five at the Health Science Center at San Antonio. Chief Cannon testified that at the Austin campus, about twelve officers were over age forty-five, but only five of those were patrolmen. He stated that these five were treated differently from the average patrolman. Three were assigned to building duty "which requires that they not be involved in confronting crowd situations or drugs and things of that nature," and the other two were waiting for a building position to open. The state argues, we think correctly, that while the latter officers are pursuing the same job as a rookie, they are not themselves rookies. The fact that two patrolmen, experienced and familiar with the campus and its inhabitants, are over age forty-five does not convince us that the state failed to demonstrate that all or substantially all applicants over forty-five would be unable to perform safely and efficiently as rookie patrolmen.

The state also endeavored to demonstrate that it is impossible or impractical to screen applicants on an individualized basis. The litigants presented distinguished experts with radically different views. The trial court chose to believe the defendant's experts. The court found "based upon the testimony of Carl Page, M.D., of Lubbock, Texas, that medical science has not yet been able to separate accurately chronological from functional age," and "based upon the testimony of Richard Jeanerett [sic], Ph.D., of Houston, Texas and Dr. Carl Page of Lubbock, Texas, that objective

testing of individuals for physical and psychological abilities to perform the work of a commissioned peace officer is difficult and seriously uncertain." Again, based on our review of the record, these findings were the subject of dispute at trial but are not clearly erroneous.

AFFIRMED.

Concurring Opinion

HIGGINBOTHAM. Circuit Judge, specially concurring: — I concur and write separately only to state candidly that our cases seem to be driven by at least three virtually sub rosa forces that make the requirements for proof of a bona fide occupational qualification under ADEA, while analogous in approach, not as exacting as those of Title VII. The first is inherent in the fact that race, sex, and national origin describe an immutable status while age is a dynamic progression. Second and relatedly is the reality that we accept the factual and legal validity of using age as a prediction of certain physical and agility skills, the inquiry being largely the correspondence between the specific age and the specific skill requirement, and we accept that age does so in such a sufficiently efficient manner that its use is not necessarily suspect. Finally, the risk of error when public safety is proved to be actually implicated is resolved in favor of safety. All of these circumstances are present here and are sufficient for me to join in affirming an otherwise close case.

No. 83-332

In the Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in concluding that petitioner's refusal to hire any persons older than 35 for certain positions violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 706 F.2d 1039. The opinion of the district court (Pet. App. 11-20) is reported at 526 F. Supp. 1135.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1983. The petition for a writ of certiorari was filed on August 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner refuses to consider any applicant over 35 years of age for the position of deputy sheriff or helicopter pilot in its county fire department (Pet. App. 1). The Equal Employment Opportunity Commission brought this action in the United States District Court for the Central District

of California to challenge petitioner's policy under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. V) 621 *et seq.*, which generally prohibits employers from discriminating against employees or potential employees on the basis of age. See *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 1.

After a trial, the district court entered judgment (Pet. App. 21-23) for the Commission. The court first rejected petitioner's contentions that Congress could not constitutionally apply the ADEA to states and their subdivisions (*id.* at 12-13) —this Court subsequently rejected a similar contention in *EEOC* v. *Wyoming, supra* — and that Congress, by permitting federal agencies to establish maximum hiring ages for federal law enforcement officers and firefighters (see 5 U.S.C. 3307(d)) had validated age restrictions like petitioner's (Pet. App. 13-14).

The court then noted that, as petitioner conceded, petitioner's only other defense to the claim that its policy violated the ADEA was that age is a bona fide occupational qualification (BFOQ) for the positions in question. The ADEA provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). The district court ruled that the Commission had the burden of proving that age was not a BFOQ. Pet. App. 14-15.

The court held, however, that the Commission had made the necessary showing (Pet. App. 15-20). The court acknowledged that "these jobs are physically arduous and require strength, agility, [and] good reflexes * * *." And the court recognized that younger persons generally are more likely to possess the necessary characteristics than older persons. But the court found that "the record establishes that there is

no strict relationship between age and physical ability. * * * Indeed, many persons over the age of forty possess the physical strength, agility and other characteristics needed for these jobs, while many persons under the age of forty lack these characteristics." In addition, the court found that "[t]he evidence also shows that persons lacking such characteristics may easily be distinguished from those possessing them by the use of simple, inexpensive, and extremely reliable physical performance tests." *Id.* at 16.

The court also remarked (Pet. App. 15-16):

> [A]s [petitioner] concedes, qualified persons hired for these positions before they reach the age of thirty five are able to continue satisfactorily well beyond that age. Indeed, [petitioner] currently employs numerous deputy sheriffs over forty years of age. Also, two of the nine helicopter pilots currently employed by [petitioner] are over forty. Given these considerations, the court finds it inexplicable that [petitioner] refuses to consider for employment persons over thirty five years of age who are satisfactorily employed in similar jobs by other government agencies.

The district court then turned to petitioner's contention that its age limitation was a BFOQ because it was needed to ensure that it would not hire persons with asymptomatic, undetected heart disease. The court noted that the evidence showed the rate of such heart disease among 35-year-old persons to be approximately 3%. But, the court found, simple tests that are "inexpensive and easy to administer" will detect "52 percent of all asymptomatic sufferers" and 99% of those who will have cardiac difficulty in the short term. The court accordingly concluded that "it is not impractical for [petitioner] to differentiate the qualified from the unqualified applicants" among those over 35, and that "only an extremely small percentage of all persons

currently barred by [petitioner's] age restrictions are likely to have heart disease and go undetected by the available medical tests * * *." Pet. App. 17-18.

Finally, the district court considered petitioner's contention that disapproving its age limitation would "saddle it with an older work force which will more rapidly become unfit for the jobs in issue * * * [thus] result[ing] in [petitioner's] receiving a less than optimal return on the initial training it provides its deputy sheriffs and helicopter pilots" (Pet. App. 18). The court noted that "the evidence showed * * * that physical unfitness for these positions did not follow inexorably from the aging process" (*ibid.*). But the more fundamental objection to petitioner's contention, the court stated, is that " '[t]he argument that the investment in training younger recruits is more likely to be recouped than that in the training of older persons would negate the entire concept of protection against age discrimination' " (*id.* at 19 (citation omitted)).

The court of appeals affirmed (Pet. App. 1-10), endorsing the district court's reasoning and ruling that its findings of fact were not clearly erroneous.

ARGUMENT

Petitioner fails to show that it has anything more than a disagreement with the district court's assessment of the evidence in this particular case. Since the district court's rulings were well founded and were upheld by the court of appeals, further review is not warranted.

1. Petitioner asserts that the courts of appeals have been inconsistent in applying the BFOQ exemption under the ADEA (Pet. 8-9, 16). In fact, the courts of appeals that have considered the BFOQ exception have consistently adopted — in substance and usually in name — the test set out in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which specifies that an age limitation is a BFOQ only

if the limitation is "reasonably necessary * * * to the essence of [the] business" and if the employer has reasonable cause for believing either that substantially all of the persons excluded because of their age would be unable to perform the job safely and efficiently or that it is impractical to make individualized determinations (*id.* at 235-236 (emphasis omitted)). In applying this test, the courts of appeals have consistently examined the facts of the particular case and have generally given deference to the district court's determination of whether the elements of the test are satisfied. See, *e.g.*, *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842, 844-846 (6th Cir. 1982); *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *EEOC* v. *City of St. Paul*, 671 F.2d 1162, 1166-1168 (8th Cir. 1982); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982); *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977). Compare *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d 743, 752-754 (7th Cir. 1983), with *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). See also *Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 951 (2d Cir. 1983). The case reprinted in petitioner's supplemental filing, *EEOC* v. *University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983), followed precisely this approach. And this is the approach used by both courts below (see Pet. App. 6-7, 10, 14).[1]

Petitioner asserts that different courts have reached different results in cases applying the BFOQ exception to what petitioner considers to be similar jobs (*e.g.*, Pet. 8-9). For

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[1]Indeed, the district court — incorrectly, in our view, and contrary to the rulings of several other courts — placed the burden of proof on the BFOQ question on the EEOC, even though the BFOQ exemption furnishes an affirmative defense.

example, some courts have upheld maximum hiring ages for certain law enforcement positions. See Pet. 9 n.7, 16. Compare *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 306-309 (holding that a maximum hiring age for airline pilots is not a BFOQ) with *Murnane* v. *American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding maximum hiring age for pilots). But this is not a conflict warranting this Court's review; it is simply the inevitable result whenever different courts apply a standard that depends heavily on the facts of each case, especially if those facts and the evidentiary showings vary somewhat from case to case. In fact, Congress specifically envisioned that the BFOQ exception would be applied in this fashion (H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967)):

> The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

Indeed, petitioner fails to explain how this Court could possibly resolve such "conflicts." In order to do so, the Court would presumably have to review evidence about the nature of various jobs, presented by all parties who might be interested, and issue a detailed scheduled specifying the age restrictions that are permissible in each category of jobs. But that is a task for a legislature or an administrative agency, not a court.

2. Petitioner also complains of the fact that Congress, in 5 U.S.C. 3307(d), has authorized the establishment of a maximum hiring age for certain federal law enforcement officers; indeed, petitioner suggests that this may even amount to a violation of the Constitution (see Pet. 8, 11-19). But the Constitution does not require Congress to treat

federal employees in the same way as the employees of state governments or other persons. See *EEOC* v. *Wyoming*, slip op. 15 n.17. Moreover, the same Congress that enacted 5 U.S.C. 3307(d) also extended the ADEA to the states; had that Congress wanted to exempt state law enforcement officers from the requirements of the ADEA, it was fully capable of making its intentions explicit. Congress has treated federal employees differently from other employees with respect to other aspects of the ADEA. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (jury trials not available to federal employees suing under ADEA). We note that the courts of appeals have consistently rejected arguments like petitioner's. See *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d at 750-751 (statutory retirement age of 55 for federal firefighters has no bearing on BFOQ exemption for city jobs); *Tuohy* v. *Ford Motor Co.*, 675 F.2d at 845 (FAA mandatory retirement age for commercial airline pilots does not establish BFOQ for non-commercial pilots).[2]

3. Finally, petitioner suggests that other courts have allowed employers to justify age discrimination on the ground that young employees will remain in their employ longer, thus giving the employer a greater return on its investment in their training (see Pet. 8-10, 19-22). Both courts below rejected this contention, reasoning that it

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[2]Petitioner relies (Pet. 8-9, 14-16) on *Stewart* v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982); *Thomas* v. *United States Postal Inspection Service*, 647 F.2d 1035 (10th Cir. 1981); and *Bowman* v. *United States Department of Justice*, 510 F. Supp. 1183 (E.D. Va. 1981). None of these cases dealt with alleged violations of the ADEA by states or private employers. *Stewart* and *Bowman* held that specific federal statutes authorizing or establishing age limitations on federal employment were not superseded by the ADEA. See 673 F.2d at 493-494; 510 F. Supp. at 1186. *Thomas* sustained the constitutionality of a federal age limitation. Plainly none of these cases aids petitioner.

would effectively nullify the ADEA. Contrary to petitioner's suggestion, every other court of appeals that has considered a similar argument has agreed with the courts below, and their conclusion is plainly correct. See *Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d at 755; *Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, 713 F.2d at 949 n.11; *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 307. Cf. *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 716 (1978) (cost justification defense not available under Title VII).

Petitioner relies (Pet. App. 9-10, 22) on *Murnane* v. *American Airlines, Inc.*, *supra*, and *Hodgson* v. *Greyhound Lines, Inc.*, *supra*. But the employer's justification sustained in those cases was unlike any contention petitioner has made here. There the employers showed that a maximum hiring age was a BFOQ because employees who had had more experience were substantially safer; if the employer were forced to hire older persons, they would never gain sufficient experience, and the safe operation of the employer's business would be jeopardized. See 667 F.2d at 101; 449 F.2d at 863.[3] Petitioner has made no such showing or contention here; and in view of the district court's finding (Pet. App. 17-18) that petitioner can distinguish those applicants who can perform the jobs safely from others on an individualized basis without using age as a proxy, such an argument would be foreclosed.

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[3]The court in *Murnane* also remarked that an otherwise valid BFOQ defense does not become invalid because the age limitation also yields collateral economic benefit to the employer. 667 F.2d at 101 n.6. This is far from saying, as petitioner contends, that any age limitation that economically benefits an employer is therefore a BFOQ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

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No. 83-332

IN THE

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COUNTY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICUS CURIAE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

The Amicus, hereinafter described, files this Brief because of its concern with numerous issues presented herein, including but not limited to the following:

1. The unreasonable and unduly strict BFOQ standard adopted by the courts below renders it virtually impossible to establish age as a BFOQ even for the most physically arduous and demanding jobs. It was not the standard contemplated by Congress when it established the BFOQ exemption, 29 U.S.C. § 623(f)(1).

2. A number of the law enforcement and firefighting agencies which are members of NPELRA have mandatory hiring and retirement age limits. The differing application of the BFOQ exemption by various courts to similar public safety occupations has created such a state of uncertainty that law enforcement and firefighting agencies have no established standard to which to conform their hiring practices.

3. There is no justification for denying state and local law enforcement and firefighting agencies the right to establish reasonable age limits similar to their federal counterparts.

This Brief is submitted on behalf of Amicus Curiae, the National Public Employer Labor Relations Association. Written consent of all parties to the filing of this Brief has been obtained, and letters of consent to such filing are on file with the Clerk of this Court.

The National Public Employer Labor Relations Association is a not-for-profit organization comprised of city, county, state, school district and federal managers, administrators, personnel directors and other officials who are responsible for personnel and employee relations decisions in their jurisdictions. This organization represents approximately 750 public jurisdictions in all fifty states. NPELRA members formulate, implement and administer labor relations policies and practices for these public jurisdictions and are responsible, directly or indirectly, for labor relations decisions involving more than 4.25 million public employees.

REASONS FOR GRANTING THE PETITION

I.

THE LOWER COURTS ADOPTED AN UNREASONABLE BFOQ STANDARD CONTRARY TO CONGRESSIONAL INTENT WHICH, UNLESS REVERSED, WILL SEVERELY DEGRADE THE QUALITY OF PUBLIC SAFETY SERVICES.

State and local law enforcement and firefighting agencies provide almost all of the police and fire protective services to the citizenry. The vast majority apply either mandatory hiring or retirement age limits. Because of the daily demands of local crime control and firefighting, the personnel of these agencies are involved in the most arduous and physically demanding of all public service occupations. Federal law enforcement functions are much more limited in scope as well as in the physical demands of their assignments. Yet, in the opinion of the Court of Appeals for the Ninth Circuit, Congress intended to apply different standards to state and local safety personnel than to comparable federal positions. We believe this conclusion is wrong.

The BFOQ standard adopted by the lower courts in this case improperly excludes any consideration of career longevity, personnel turbulence, and the enormous economic impact the elimination of age limits would have on the service agency and on the quality of its protective services. The holding is unduly stringent and contrary to the intent of Congress which specifically considered such factors when it authorized the setting of age limits for comparable federal occupations. The BFOQ standard articulated by the Court of Appeals, in conjunction with the medical evidence it relied upon, renders it virtually impossible for the states to sustain an age limit as a BFOQ for any occupation, no matter how strenuous and physically demanding the job may be.

The unduly strict standard adopted by the Court of Appeals further underscores the disparate treatment between federal and state law enforcement occupations, even though both admittedly are governed by the same federal statute. In the view of the Court of Appeals, age limits on similar, if not less arduous, federal law enforcement and other occupations are legal. The standard applied to state agencies such as Los Angeles County, however, renders it virtually impossible for state and local agencies to maintain any age restriction, even a reasonable one as here.

The Court of Appeals erred in rejecting consideration of the federal age limits on comparable occupations by focusing on jurisdictional factors rather than on Congress' intent for and conception of the BFOQ exemption. It is clear from the legislative history that Congress did not intend the BFOQ standard to be so strict as to be illusory. Nor did Congress intend to reject consideration of career longevity and other personnel and economic factors as they affect law enforcement agencies. Congress specifically recognized the need for law enforcement and firefighting agencies to be comprised of young and physically able individuals. In approving legislation authorizing the establishment of mandatory hiring and retirement age limits for federal law enforcement and firefighting personnel, Congress clearly stated that the intent of the legislation was to help federal law enforcement and firefighting agencies maintain a relatively young, vibrant and effective work force, both for the safety of individual officers and for the society which they serve. *See* S. Rep. No. 93-948, 93rd Cong., 2d Sess., *reprinted in* 1974 U. S. Code Cong. & Ad. News 3698. The same criteria that guided Congress' authorization of federal age limits cannot, and should not, be denied equal consideration by state and local public safety organizations.

Law enforcement/firefighting agencies are uniquely career oriented and experience intensive. Almost all such agencies require substantial field experience in the arduous assignments before assignment to less strenuous supervisory posts. At least half of a police officer's career is spent in physically demanding assignments such as patrol work—assignments which demand optimum, rather than bare minimum, physical strength and endurance. Training demands, the existence of special disability statutes, and the need to retain experienced and physically qualified officers in the arduous assignments are factors that counsel against the Court of Appeals' embracement of what is in effect a continual testing and elimination program.

Career longevity factors, cost effectiveness and the current uncertain state of medical science's ability to detect age-related

diseases justify a reasonable hiring age limit for state and municipal police and firefighters, just as they do for pilots, bus drivers, and federal police and firefighters. The issues raised in the petition of the County of Los Angeles need to be promptly addressed by this Court, not only to avoid conflicting interpretations and applications of the BFOQ exemption under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1), but also to guide municipalities in the adoption of appropriate hiring practices.

II.

A SUPREME COURT DECISION ON THE BFOQ STANDARDS APPLICABLE TO LAW ENFORCEMENT AGENCIES IS IMPERATIVE TO PREVENT CONFLICTING LOWER COURT APPLICATION.

Not only is there unjustified disparate treatment under the ADEA as between federal and state law enforcement occupations, different results continue to obtain in cases involving state and local agencies upon essentially the same facts and, presumably, the same BFOQ standard. Thus, age limitations have been upheld under the ADEA for bus drivers, airline pilots, highway patrol officers, firefighters and, most recently, college campus police officers. *EEOC* v. *University of Texas Health Science Center at San Antonio,* 710 F. 2d 1091 (5th Cir. 1983). Other courts have struck down, as being in violation of the ADEA, mandatory retirement ages for firefighters and police officers (albeit, in the latter circumstance, the individual was assigned to a non-arduous supervisory position).

Numerous courts have adopted a more relaxed BFOQ standard where public safety is involved. *EEOC* v. *University of Texas Health Science Center at San Antonio,* 710 F. 2d 1091 (5th Cir. 1983); *Murnane* v. *American Airlines, Inc.,* 667 F. 2d 98 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 915 (1982); *Hodgson* v. *Greyhound Lines, Inc.,* 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.,*

419 U. S. 1122 (1975). Others have permitted consideration of career longevity factors such as the time available or required to become an experienced employee. *Murnane,* 667 F. 2d at 100-01. Many courts have recognized that the medical state of the art is such that it is presently impossible or impractical to detect age-related disabilities except by reference to age. *Hoefelman* v. *Conservation Commission of the Missouri Department of Conservation,* 32 Fair Empl. Prac. Cas. (BNA) 1773 (8th Cir. 1983); *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F. 2d 224 (5th Cir. 1976); *Potest* v. *Palestine,* 620 S.W.2d 181 (Tex. Civ. App. 1981).

Most recently, the Court of Appeals for the Eighth Circuit upheld the removal at age 60 of a pilot employed by the Missouri State Department of Conservation on the ground that age was a BFOQ because there is no way to determine whether individual pilots are able to fly safely and efficiently except by reference to their age. *Hoefelman,* 32 Fair Empl. Prac. Cas. (BNA) at 1775-77. Although *Hoefelman* involved airline pilots, the same BFOQ exemption applicable in this case was applicable there. Unless the medical state of the art is vastly different between Missouri and other states, the same medical limitations on the detections of age-related disabilities should be recognized with regard to other state agencies.

Inconsistent and disparate treatment of age limits for law enforcement and firefighting occupations, whether in federal, state or local service, was clearly not intended by Congress. Congressional action and attendant legislative history amply demonstrate that Congress recognized age limits as appropriate under the ADEA for similar police and firefighting occupations, regardless of jurisdiction. It certainly did not intend that age limits for comparable occupations be both accepted and rejected upon the same medical evidence and BFOQ standard. Different results based on different duties or in degree of physical ability required may be justified, but not because of diverse application of the BFOQ standard. If entry age limitations are valid under the ADEA for federal officers, airline

pilots, campus police and bus drivers, as courts have held, they also should be valid for metropolitan police officers and firefighting helicopter pilots such as employed by the County of Los Angeles.

It is precisely this difference in treatment, highlighted by the inconsistent interpretations and applications of the BFOQ criteria, that is deeply disturbing to the amicus and its members. Unless guidance consistent with Congressional intent is provided by this Court, continuing diverse results will obtain with serious and far reaching impact on the nation's protective services.

This Court should grant the petition in order to consider pressing legal questions that were not in issue in *EEOC* v. *Wyoming*, 103 S.Ct. 1054 (1983), *i.e.*, to determine the appropriate BFOQ standard and criteria for law enforcement and firefighting occupations and to harmonize the application of the ADEA and its BFOQ exemption to comparable federal and state occupations.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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